

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|-----------------------|---|----------------------------|
| |) | CIVIL FILE |
| Donald Sanders, |) | NO. 17-CV-5106 (ECT/KMM) |
| |) | |
| Plaintiff, |) | |
| |) | VOLUME IV |
| vs. |) | |
| |) | |
| BNSF Railway Company, |) | Courtroom 3B |
| |) | Thursday, December 9, 2021 |
| Defendant. |) | St. Paul, Minnesota |
| |) | 9:00 A.M. |

JURY TRIAL PROCEEDINGS

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE
AND A JURY**

A P P E A R A N C E S:

For the Plaintiff: NICHOLS KASTER, PLLP
By: JAMES H. KASTER, ESQUIRE
LUCAS J. KASTER, ESQUIRE
4700 IDS Center - 80 South Eighth Street
Minneapolis, Minnesota 55402-2242

**For the Defendant: ARTHUR CHAPMAN KETTERING SMETAK
& PIKALA, P.A.**
By: SALLY J. FERGUSON, ESQUIRE
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, Minnesota 55402-3214

STINSON, LLP
By: TRACEY HOLMES DONESKY, ESQUIRE
50 South Sixth Street - Suite 2600
Minneapolis, Minnesota 55402

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - United States District Court
Warren E. Burger Federal Building & U.S. Courthouse
316 North Robert Street - Suite 146
St. Paul, Minnesota 55101
651.848.1224

1 (9:00 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 (Without the jury)

5 THE COURT: Good morning, everyone. Please be
6 seated.

7 Mr. Kaster.

8 MR. JAMES KASTER: Thank you, Your Honor. Two
9 matters. One is a logistical matter. We'll be offering a
10 new exhibit, that was not previously marked, as P-288 and
11 the exhibit is the supplemental report of Dr. Boisso. We
12 have stripped out all reflections in the tables of front
13 pay, so that's pursuant to the Court's directive.

14 And my suggestion is that after Dr. Boisso
15 testifies, that I think we'll be cornering in on the morning
16 break; and if the Court wants to take a break and hear from
17 Dr. Boisso on the front pay calculation and any questions
18 the Court has. My questions for Dr. Boisso at that point
19 will be brief, but the Court may have questions about his
20 calculation. Obviously he's just extending out the
21 calculations with front pay.

22 So that is my suggestion about proceeding.
23 Obviously the Court can choose to do what the Court prefers.

24 THE COURT: Was the doctor deposed?

25 MR. JAMES KASTER: Was he deposed?

1 MS. FERGUSON: Yes.

2 MR. KASTER: Yes.

3 THE COURT: Yes, was there cross-examination on
4 the front pay question?

5 MS. FERGUSON: Yes.

6 THE COURT: Do you anticipate that his testimony
7 today will be different from his deposition testimony or
8 additional?

9 MR. JAMES KASTER: I don't recall, but I don't
10 think so. I obviously -- I didn't look at his deposition
11 again last night, so I don't recall. But I don't think so.
12 I think his deposition would be sufficient for the Court.

13 THE COURT: Okay.

14 MR. JAMES KASTER: I'd be happy to offer that if
15 the Court chooses that alternative.

16 THE COURT: I think what I would prefer to do is
17 receive briefing on the question with citations to the
18 deposition and the report, as opposed to taking break time,
19 which is needed not just for the jury but for court staff as
20 well.

21 MR. JAMES KASTER: Sure.

22 THE COURT: You know, I guess I wouldn't be
23 opposed to, if there's time at the end of the day today,
24 keeping him around for that; but I don't want to do that if
25 the witness has other places to be or go. That's an option,

1 but I think it's sufficient to deal with this on the
2 deposition testimony and the report.

3 MR. JAMES KASTER: My understanding is based upon
4 my discussions with counsel is we will be done early today.
5 I think the witness will be able to stay if the Court has
6 questions for him at that point; and I'd be happy to proceed
7 that way. And obviously I need to talk to the witness to
8 ensure -- he's from out of state. He has a flight. I
9 assume his flight is at the end of the day, but I'll just
10 confirm that.

11 THE COURT: All right. Let's confirm that and
12 then at least then we know that's an option in the event it
13 surfaces.

14 MR. JAMES KASTER: Yeah. Then I want to make a
15 record. It's day four, Thursday, of the jury trial in this
16 matter. It's 9 o'clock in the morning. We haven't
17 started -- 9:05 actually -- we haven't started testimony yet
18 today.

19 I am concerned about evidence that's been admitted
20 in the case so far. They are two. We have evidence of a
21 report of -- or a finding from the labor body on the union
22 contract. Yesterday during testimony we had
23 cross-examination of Mr. Mozinski using the actual reasoning
24 of a labor arbitrator.

25 On a different matter, with a different standard.

1 And we also heard examination of Mr. Mozinski on
2 the OSHA determination, which is not a determination but a
3 preliminary finding in this matter, which is -- this case is
4 a trial *de novo* by statute, which means as literally, we
5 start over.

6 So I'm very concerned. I think -- I believe, Your
7 Honor, that the admission of these documents is error and I
8 believe that the allowance of examination of witnesses about
9 the reasoning of the labor arbitrator on a different matter
10 is misleading to the jury under 403. I've objected. I
11 understand the Court's ruling.

12 I would just say on **Gunderson**, I believe that case
13 is distinguishable. I don't think that the Court of Appeals
14 creating a laundry list of why the plaintiff had a bad case
15 creates license to admit those items in front of a jury,
16 especially when the jury doesn't know the different
17 standards in a contract dispute under the labor contract
18 versus this case; nor does the jury understand that the OSHA
19 findings are an administrative step in the process and that
20 this trial is the trial *de novo*. And that those findings
21 were not findings on the merits, and certainly the findings
22 of the labor arbitrator were not findings on the merits of
23 this case. It has nothing to do with the merits of this
24 case. The standards are different, the evidence is
25 different, the issue is different.

1 And I would just note I took a look at the public
2 records exception, which is how this was offered under
3 803(8), subdivision (8), and certainly it has those
4 standards of what can be admitted. And on the face of it,
5 it appears that findings in a civil case, the Government in
6 a criminal case, factual findings from a legally authorized
7 investigation, certainly it fits that -- some of these
8 things fit that framework.

9 I would note in the comments section of the rule
10 it specifically talks about certain public records that are
11 excepted and admission denied, like a police report, for
12 example, because the police report contains evaluative
13 judgments that are intended if offered to do one thing,
14 which is to supplant the judgment of the jury.

15 And the Court -- and the comments go on on page
16 424 to say this:

17 "Factors which may be of assistance in passing
18 upon the admissibility of evaluative reports include the
19 timeliness of the investigation, the special skill or
20 experience of the official, whether a hearing was held and
21 the level at which it was conducted, possible motivational
22 problems."

23 It goes on in the comments to talk about the split
24 in terms of admissibility in some courts and on some issues
25 and in other courts and on other issues.

1 In this particular case, what we have with the
2 jury, and I believe we have a very smart jury so I give them
3 lots of credit. Obviously we have a couple with legal
4 training. I don't know that any of their training is going
5 to inform them that the OSHA findings are not a finding on
6 the merits but a determination that's a part of the
7 administrative process of this case, and that this case is a
8 trial *de novo*; and that the findings of the labor
9 arbitrator, when examined before a witness and asked about
10 whether he agrees or disagrees with those findings, are
11 fundamentally misleading. They have one purpose and that is
12 to supplant the discretion and decision of the jury in this
13 case and have them defer to the administrative findings in a
14 different case with a different issue.

15 So fundamentally I say this: I objected yesterday
16 on 403 grounds. I don't believe these findings are
17 relevant. They have one purpose, which is to distract the
18 jury from the evidence in this case. And we are now
19 devolving into a case where the defense main argument is
20 that the jury's decision has already been made by a
21 different body, so I object.

22 I think further examination and evidence on this
23 topic magnifies the error, and I believe that we are getting
24 to the point where the plaintiff is being denied his trial
25 on these issues with this evidence.

1 THE COURT: I think, Mr. Kaster, you've made that
2 record already, and I think -- you may have added to it here
3 method and I don't begrudge you the opportunity to do that,
4 but -- and I don't know that I disagree with -- I certainly
5 don't disagree with all of what you said. But we've talked
6 about this and I don't think it serves much of a purpose to
7 continue to talk about it.

8 Where we need to spend our time at this point is
9 on a limiting instruction, and I'm confident we'll be able
10 to do that.

11 MR. JAMES KASTER: All right. Your Honor --

12 THE COURT: If you've got a motion for a mistrial,
13 then that's something you need to get to and make.

14 MR. JAMES KASTER: I understand that, Your Honor.

15 You understand also that we have all been waiting
16 for the trial of this case for a long time.

17 THE COURT: As have I.

18 MR. JAMES KASTER: I know that, and I know the
19 Court is accommodating that. My hope is that the trial of
20 this case be decided on the evidence, the factual evidence
21 in this case. So I appreciate the fact that the Court has
22 allowed me to make this record. Thank you.

23 THE COURT: Certainly.

24 Does BNSF wish to add to that record?

25 MS. FERGUSON: I would like to comment first on

1 the Boisso supplemental report. There are some things in
2 this that maybe we can work out that still refer to full
3 retirement age and calculations out to full retirement age,
4 and I would ask that those be removed because they're not
5 relevant to the back pay. I've highlighted those and
6 hopefully we could just wipe those out or make some change.

7 MR. JAMES KASTER: I'm happy to do that. I did
8 talk to Dr. Boisso this morning to make sure that what we
9 were doing with any retirement calculation was bringing that
10 to this date. So there is a retirement loss, but it's only
11 through this date. So I believe if we can sit down with
12 Dr. Boisso for a few minutes and make sure. If you want,
13 I'd invite a conversation to make sure that we stripped out
14 any front pay calculations, because that was the intent.

15 MS. FERGUSON: I'm not as concerned about his
16 testimony, but if you intend to introduce what you gave me
17 this morning there are things that need to be taken out of
18 there.

19 MR. JAMES KASTER: Okay. Well, I'm happy to
20 discuss that.

21 MS. FERGUSON: Okay.

22 THE COURT: And I think you ought to get to that
23 promptly so we don't take too much longer here before we get
24 the jury in here.

25 MR. JAMES KASTER: Can we have a few minutes with

1 the expert to go through this?

2 THE COURT: Yes, right.

3 MR. JAMES KASTER: If it's true that we have
4 things -- what I'd like the jury to have, just for their
5 convenience, is the actual table of calculation; because
6 otherwise they're screwing around talking about notes if
7 they find for the plaintiff.

8 MS. FERGUSON: Is there one page that you want as
9 opposed to the packet?

10 THE COURT: I think we're having a discussion
11 that's probably better between counsel than on the record if
12 that's all right.

13 MR. JAMES KASTER: Fine.

14 MS. FERGUSON: The only other comment I would make
15 as to the second discussion about the admission of the NRAB
16 report, that wasn't introduced as a public record. It was
17 introduced through Mr. Mozinski because he was the union rep
18 who represented Mr. Sanders and was familiar with the
19 document, so that was how the document was introduced.

20 THE COURT: Yeah, I understood the public records
21 exception question was a separate issue, that I don't think
22 I've seen any sort of briefing on yet, that I suggested
23 would be appropriate in the event someone thought that ought
24 to come in other than through a witness with personal
25 knowledge of the document.

1 All right. I'll adjourn at this time. I'll allow
2 you to take that time to reach that agreement. As I said, I
3 would really request that you --

4 MR. JAMES KASTER: I will be very brief, Your
5 Honor. Thank you.

6 THE COURT: Thank you.

7 (Recess taken at 9:16 a.m.)

8 * * * *

9 (9:25 a.m.)

10 IN OPEN COURT

11 (Jury enters)

12 THE COURT: Thank you, everyone. Please be
13 seated.

14 Mr. Kaster?

15 MR. JAMES KASTER: Thank you, Your Honor.
16 Plaintiff calls Dr. Dale Boisso to the witness stand.

17 THE COURT: Good morning, Dr. Boisso.

18 DR. BOISSO: Good morning.

19 THE COURT: Why don't you stand up between the
20 railing and the seat right there on the witness stand and if
21 you would, please, stand and face me. Please state your
22 full name for the record, spelling your last name.

23 DR. BOISSO: Dale Edward Boisso. B, as in boy,
24 O-I-S-S-O.

25 THE COURT: All right. Please raise your right

1 hand to be sworn in.

2 **DALE EDWARD BOISSO, PLAINTIFF'S WITNESS, SWORN**

3 THE COURT: Thank you, sir. Please have a seat.

4 **(DALE EDWARD BOISSO)**

5 **DIRECT EXAMINATION**

6 BY MR. JAMES KASTER:

7 Q. Dr. Boisso, if you are comfortable, you can take your
8 mask off.

9 A. Thank you.

10 Q. Thank you. Why are you here today?

11 A. I was -- or have been hired by Mr. Sanders' attorneys to
12 come in and explain to you how I have calculated
13 Mr. Sanders' financial losses. I am an economist and I do
14 work like this in many different types of cases.

15 Q. What's your educational background?

16 A. I have a bachelor's degree in political science from
17 Eastern Illinois University, a master's degree in economics
18 from Eastern Illinois University, and a Ph.D. in economics
19 from Southern Methodist University in Dallas.

20 Q. Dallas is actually where you live, right?

21 A. A suburb, yes.

22 Q. Yeah, okay. Why don't you tell us about your relevant
23 professional experience. First of all, start with this. At
24 which schools have you taught?

25 A. Over about a 30-year period, Parkland College in

1 Champagne, Illinois; and then Western Illinois University
2 which is in McComb, Illinois; and then now known as Missouri
3 State University in Springfield, Missouri; and then also at
4 Southern Methodist University in Dallas.

5 Q. And what courses have you taught?

6 A. Principles of microeconomics, principles of
7 macroeconomics, intermediate macroeconomics, intermediate
8 price theory, money and banking, statistics for economics,
9 trade policy and world trade systems, international trade,
10 cost benefit analysis, and public finance.

11 Q. Tell us about your various areas of professional
12 consulting.

13 A. Well, in addition to teaching over a 30-year period at
14 the university level, I have worn maybe four different hats
15 through my professional career. One of them I have worked
16 with small start-up companies to prepare their financial
17 statements: Their income statements, their cash balance --
18 pardon me -- their balance sheet, their cash flow
19 statements. Then they would take that to, for example, the
20 Small Business Administration or a bank to get a loan to
21 start up their business.

22 I have worked on a *pro bono* basis with several
23 nonprofit organizations to try and help put a dollar value
24 on the benefit that they are hopefully bestowing upon their
25 patients, their clients; whether it's people or

1 environmental clients or even animals. Since there's no
2 dollar value that they can measure in terms of profits, so
3 to speak, they are hopefully having some impact on the
4 people, so I try and estimate what that dollar value is.

5 I have worked for municipal governments and also
6 in the State of Texas to try and estimate what is a fair and
7 reasonable price for tow truck companies to tow your vehicle
8 when you're illegally parked. A very contentious issue.
9 And then, of course, I've been doing work in various types
10 of litigation, the same reason that we're here today.

11 Q. Have you done any -- you've talked about teaching at the
12 collegiate level. Have you done any other kind of teaching?

13 A. Yeah. I used to do a lot of continuing education
14 training for attorneys. Essentially it would be lunchtime
15 presentations of how to calculate financial losses in a
16 variety of different types of lawsuits, whether it's
17 wrongful employment termination or personal injury or patent
18 infringement or contract breach between two businesses.

19 Different ways of computing that financial loss, so I go in
20 and help the attorneys understand how that's done.

21 Q. Now, usually when you do a financial analysis, it comes
22 in the form of what we call a report; right?

23 A. Yes.

24 Q. So how many reports have you calculated financial losses
25 for in wrongful employment termination cases, do you think?

1 A. Well, I've been doing this for 26 years, and I have
2 records for only the last 16 because I was working for other
3 companies the first 10 so I don't know the numbers. But in
4 the last 16 years, I've done about a hundred fifty cases
5 involving wrongful employment termination, and then of
6 course there's other types of cases.

7 Q. How many reports in other types of cases have you
8 completed?

9 A. In the last 16 years, it's over 500 total.

10 Q. What percentage of cases are you hired by the plaintiff
11 as opposed to a defendant?

12 A. My caseload has always been about 50/50 plaintiffs and
13 defendants.

14 Q. And have you testified for both plaintiffs and
15 defendants in court proceedings like this?

16 A. Yes.

17 Q. And have you testified in federal as well as state
18 courts?

19 A. Yes.

20 Q. How many times, do you think?

21 A. Actually, I had to count that the other day. This is
22 number 39.

23 Q. Are you affiliated with any professional organizations?

24 A. Currently I am with two: The National Association of
25 Forensic Economics and the American Academy of Economics and

1 Financial Experts.

2 Q. And regarding these professional organizations, do they
3 have any control over work you do or how you do the work?

4 A. No, not directly; but to be a member of both of those
5 organizations, I have to agree to or you might also say
6 accept certain statements ethics principles that they have
7 put forth. So of course I do agree with those principles;
8 and generally speaking, there's like ten of each in each of
9 those.

10 The most important ones probably are that when I
11 prepare a report, I do it in a way that I have provided
12 enough description of how I've done the calculations and my
13 sources of information so that another competent economist
14 can come along and look at what I've done and replicate it
15 and be able to know exactly what I've done.

16 I do not work on a contingency basis. I work
17 strictly by the hour, the time that I put in. So if a jury
18 awards dollars to the plaintiff, I do not get a percentage
19 of that.

20 I agree to use generally accepted principles and
21 methods of calculating economic losses and valid and
22 reliable data. That way we're sure that the estimate is as
23 valid and reliable as possible. I know that there's others
24 that I'm just not recalling them right now, but I absolutely
25 adhere to them.

1 Q. What were you asked to do in this case?

2 A. Generally just asked to calculate the financial losses,
3 if any, of Mr. Sanders. It's kind of a given if it gets to
4 the point I need to be deposed or come to trial and testify,
5 then of course I'll be there.

6 Q. And were you able to reach an opinion on the value of
7 his financial losses?

8 A. Yes.

9 Q. And what information did you review for the purpose of
10 that opinion? Just let me stop you there before we go into
11 that.

12 We'll be offering Plaintiff's 288 which I will do
13 now for the purpose of expediting your discussion of what
14 you review. Do you have a listing of that, correct?

15 A. Yes.

16 MR. JAMES KASTER: So offer Plaintiff's 288.

17 MS. FERGUSON: With the proposed revisions we
18 discussed, no objection.

19 MR. JAMES KASTER: And those revisions will be
20 made and we'll honor those as we go through the testimony,
21 Your Honor.

22 THE COURT: As agreed, then admitted and it may be
23 published.

24 BY MR. JAMES KASTER:

25 Q. So, Karla, we're going to have to blow this up a little

1 bit for people to see.

2 So this is a listing of what information that you
3 had for the purpose of doing the calculation. We don't need
4 to run through everything, but why don't you just give us a
5 summary.

6 Karla, why don't you go to the bottom of the page
7 then before the witness just gives us just a summary so we
8 can see all of that.

9 A. Okay. Generally what we saw there at the top I looked
10 at Mr. Sanders' W-2 wage statements. I also looked at his
11 pay stubs from his various employers. I also did my own
12 research for certain statistical information that I would
13 need to do various calculations.

14 I read Mr. Sanders' deposition transcripts. I
15 read the report and the deposition transcript of one of the
16 defendants' experts, Suanne Grobe Ranheim, I believe her
17 name is.

18 I spoke on several occasions with Mr. Sanders to
19 get clarification of about his wages and benefits.

20 I spoke with three different individuals in the
21 union to get information about wages over time and benefits;
22 and those individuals sent me union agreements that
23 contained wage information and benefit information, the cost
24 of benefits and so on.

25 Let's see. What else.

1 Q. All of which you looked at is listed here, right?

2 A. What is listed here actually is what I either received
3 from your office or is a consequence of my own research.

4 Q. And if we go to the second page of this document,
5 there's a continuation of all of what you reviewed for the
6 purpose of doing these calculations of financial loss;
7 right?

8 A. Exactly, and is pretty much is what we just listed.

9 Q. And then we actually have to go to the third page and we
10 can see finally what else you considered; and I think you
11 have listed at item 69 here or line 69 the Brotherhood of
12 Maintenance of Way Employees rates of pay; right?

13 A. Correct.

14 Q. Is that information that you obtained from the union
15 contacts that you made?

16 A. Yes.

17 Q. Did you have all the information you believe you needed
18 for the purpose of doing a calculation?

19 A. Yes.

20 Q. Is the methodology that you used generally accepted by
21 other economists and practitioners in your field?

22 A. Yes, it is. As I said, I've been doing this work for 26
23 years, and over those years I've read the journal articles
24 that are published by the two organizations that I mentioned
25 earlier. I've also read books on how other economists like

1 myself have addressed calculating financial losses.

2 And over time, you know, it's come to kind of a
3 consensus as to how to calculate financial losses in
4 different types of cases, and what is appropriate data and
5 what is appropriate method, and what is not an appropriate
6 method. So not only have I done all that reading, I have
7 also observed the best practices and the worst practices of
8 some other economists and have learned from that.

9 Q. So the methods that you used are generally accepted in
10 your field?

11 A. Absolutely.

12 Q. You were asked to value Mr. Sanders's financial loss.
13 How did you go about estimating that value? And let me stop
14 there before you answer that because I think it would be
15 helpful to walk through some of the information in your
16 tables. We looked at the data that you reviewed, which are
17 pages 1 through 3 of plaintiff's 288. Why don't we go to
18 the data that's contained on page what is numbered page 4
19 but is actually page 1 of 2.

20 This would be table 1-A. Thank you. So just
21 blowing up to there.

22 Now this was data that you had for the purpose of
23 doing the calculation; right?

24 A. Yeah. Obviously these are all dates and what
25 Mr. Sanders' age would be at each of those dates. And then

1 the right-most column is, if you go to the table that we
2 were looking at previously, it simply shows you where I got
3 that information.

4 Q. Okay. And then let's go to the bottom of the page
5 because this shows us Mr. Sanders' earnings at BNSF;
6 correct?

7 A. Correct.

8 Q. And I'm going to stop you there because we heard some
9 numbers the other day in terms of Mr. Sanders' wages, I
10 believe that were different than these numbers and so let's
11 clarify.

12 When we go to -- let's look at 2012 through 2016,
13 or just 2012 through 2015. Those numbers are based upon
14 what? Is that his net pay or his gross pay?

15 A. That's his net pay.

16 Q. That's his gross wages, though; right?

17 A. I apologize. That is his gross pay before anything like
18 payment for benefits or whatever, or taxes is taken out.

19 Q. Okay. So the number in that column that starts out
20 gross wages is before taxes, before any removal of any
21 calculation of his contribution for benefits or whatever?

22 A. That's correct.

23 Q. Okay. And that number that's in 2016, that's the number
24 through the date that -- of 4-29-2016; right?

25 A. Correct.

1 Q. All right. Then if we go to the next page of the
2 document, table 1-A, page 2, why don't we blow up that
3 section of the report that begins "Estimated BNSF payments
4 toward insurance benefits, contributions," and then -- so if
5 we can just take that section of the page and blow it up,
6 please.

7 So what is this, Dr. Boisso?

8 A. The first section there, BNSF's payments toward
9 insurance benefits, that's the total dollar value of medical
10 care, vision, dental, and maybe a few other minor types of
11 insurance that BNSF paid on -- or pays on behalf of its
12 employees.

13 Now, it is an average. It's kind of averaged over
14 all of the employees, but I had, what, three years, 2016
15 through 2018 for the benefit amount. So for example, in
16 2016 the total amount paid on behalf of the employees on
17 average was \$18,957. And that would be, again, for the
18 medical, health, vision, dental, and so on.

19 Q. All right. Let's go to the bottom of that page starting
20 with post April 29th, 2016 employment. This shows us,
21 Mr. Sanders' mitigation -- what's called mitigation
22 earnings; right?

23 A. Yes.

24 Q. What does that mean, mitigation earnings?

25 A. It is the amount -- in this case the companies that he's

1 worked for and the dollar amounts of his annual earnings for
2 those particular companies, so it would be after his
3 termination.

4 Q. So that's the amount he's made sense he left BNSF;
5 right?

6 A. Correct.

7 Q. All right. Let's go to table 2, because this is a
8 summary table; right?

9 A. This is where I actually do the calculations of his
10 financial loss up to the date of the trial.

11 Q. Okay. And so why don't we pass on this and we'll walk
12 through rest of the calculation and come back; okay?

13 A. Okay.

14 Q. So let me take you to table 4-A, and why don't we blow
15 up a section of that that goes down to the total incremental
16 payments so everyone can see what you're talking about.

17 Why don't you tell us what this is.

18 A. This is the first of four steps that I needed to do in
19 order to calculate any difference in his retirement benefits
20 from BNSF relative to what his retirement benefits would be
21 through Social Security. Again, using the back pay period
22 that is all his earnings, up to the difference up to the
23 date of the trial on Monday.

24 So what I'm doing here in this first step is, if
25 you're going to participate -- if you're going to work,

1 you're going to be paying Social Security taxes; or if
2 you're working for the railway --

3 Q. Let me stop you, Dr. Boisso. I'm sorry, excuse me.

4 When you work at BNSF or other railroads around the country,
5 are you participating while you're working at BNSF in Social
6 Security?

7 A. No.

8 Q. So what happens to those workers? What are they a part
9 of? What is their world?

10 A. The railroads have their own pension systems and they're
11 named, I don't know why, Tier I and Tier II. They actually
12 have two pension systems, so they do not participate in the
13 Social Security system when they're working for the
14 railroad.

15 Q. So that's what you're talking about comparing this
16 benefit to Social Security; right?

17 A. Right.

18 Q. So why don't you go ahead and describe what you did
19 here.

20 A. Okay. So what you see in columns D through H is I'm
21 calculating the estimated tax that Mr. Sanders would pay for
22 his Tier I retirement benefits and his Tier II retirement
23 benefits, during the period from when his employment
24 terminated to the date of the trial. Again, if you're going
25 to participate in the pension system, you also have to pay

1 into it, and the railroad companies are also paying into it.
2 So this is essentially a cost to get the benefit at some
3 later date.

4 And what you see there in columns I through K is I
5 am estimating what his contribution or payment of Social
6 Security taxes would be based upon his earnings in the post-
7 termination period. And so if I subtract what his taxes for
8 Social Security in the mitigating period, in the post-
9 termination period, from what the taxes that he would pay if
10 he had continued working for BNSF, that difference is the
11 extra cost it would be for him to receive retirement
12 benefits at some later date.

13 Q. Through RRB you mean, or through Social Security, either
14 one?

15 A. Right. It's kind of a combination of the two.

16 Q. Okay. Let's go to page 1 of 2 of table 4-B. First of
17 all, if we can blow up, please, just that top title, so when
18 we -- the title that Dr. Boisso has put on this.

19 The PIA, what is this?

20 A. This is when you get -- when you get your Social
21 Security statement and it tells you what your benefit value
22 is going to be upon retirement, Social Security
23 Administration calls it your PIA, your Primary Insurance
24 Amount. We just call it our benefit.

25 Q. All right. Let's go down to the bottom of the graph

1 then, please. Not all the way to the bottom, I'm sorry. If
2 we can blow up so people can read as much of the numbers?

3 Why don't you just tell us what you did here.

4 A. Without going into too much detail, this is essentially
5 how Tier I benefits and Social Security benefits are
6 computed. The Social Security Administration has a fairly
7 complicated way of determining what our benefits will be,
8 and the Tier I benefit that the railroad companies use uses
9 exactly the same formula.

10 So I'm simply computing what his benefits might
11 have been had he continued working -- his retirement
12 benefits had he continued working for BNSF up to the trial
13 date, and comparing that to what his retirement benefits
14 might be if he, you know, not only prior to his termination
15 and all of his jobs working before the railroad, but also
16 the jobs after the working for the railroad.

17 Q. Again, to date of trial; right?

18 A. Correct.

19 Q. Let's go to the next page and tell us -- if we could
20 blow up that section right to the 2631 and 2423? Thank you,
21 Karla.

22 Tell us what this is.

23 A. This is kind of the final step in the calculation of the
24 PIA, or the benefit. As you see, there's a series of
25 numbers there and I'm simply applying the Social Security

1 Administration's formulas in order to come up with the
2 benefit.

3 So as you see at the bottom of column G, G as in
4 goodness, the total PIA is based -- is value is \$2,631. So
5 if we're just measuring what his Tier I benefits would be
6 upon retirement and measuring it only up to the trial date,
7 then he would be getting \$2,631 a month.

8 And then what you see over in column M, that
9 figure at the bottom, \$2,423, using Social Security
10 Administration's method of calculation, this is what his
11 benefit will be on a monthly basis based upon his earnings
12 up to the date of trial.

13 Q. All right. If we can go -- thank you.

14 If we can go to the next table, table 4-D, step 3.
15 Why don't we blow that up as much as possible so it's a
16 longer page but so people can follow along.

17 So, Dr. Boisso, what is this?

18 A. As I mentioned, the railroad companies have two
19 different pensions. This is how you calculate the Tier II
20 pension value. Again, it has a certain formula that you
21 have to apply and certain bits of information that have you
22 have to apply, and so all I'm doing is simply calculating
23 that.

24 So in columns B and C you see -- pardon me. In
25 column B you see his actual earnings up until 2015, that's

1 in column B as in boy; and then columns -- pardon me -- rows
2 associated with 2016 through '21, that is a projection of
3 what his earnings might have been at BNSF had he continued
4 earning at the rate that he was prior to that and with some
5 growth in his wages.

6 And then what you see over in column D as in dog,
7 that's his actual wages through those years while working
8 for BNSF.

9 And then the calculations that are done below, I'm
10 simply following the Tier II formulas in order come up with
11 the dollar value of the benefit. And that's what you see at
12 the very bottom, and it's bottom of column C. Had he
13 continued working for BNSF, his monthly benefit would have
14 been \$842.16, but since his employment with BNSF -- pardon
15 me -- ended, his Tier II benefits are only going to be
16 \$447.07 upon retirement per month.

17 Q. And those calculations, again, take this scenario
18 through date of trial; right?

19 A. Correct.

20 Q. And then finally one calculation before we go back to
21 the first table that we looked at, the summary table, you
22 have table 5. Tell us what is table 5.

23 A. As we will see in table 2 where I calculated his loss
24 backpay from the date of termination to the trial date,
25 since he lost monies in each year, would have earned more

1 had he stayed with BNSF than he has actually earned since
2 leaving BNSF. He's not, as you see in column G, you see the
3 dollar amounts that he has lost each year. And so he has
4 not had those monies available to him; but if he had had
5 those monies available to him, he could have earned
6 interest, put it some kind of investment opportunity,
7 whatever it might be, and earned interest on that.

8 So what we see the calculation in column I is the
9 value essentially lost interest on the differences in his
10 earnings since termination between -- the difference between
11 what his earnings might have been at BNSF and what they
12 actually have been in his various jobs since then.

13 Q. And if we look at column H, you indicate the rate of
14 interest that is used for this purpose is 10 percent; right?

15 A. Yes.

16 Q. Now, in terms of if we were talking about a sum of money
17 in the future, like, for example, \$10,000; and you were
18 going to receive that money five years from now, would you
19 conversely do a calculation to bring that value back to
20 present value?

21 A. Right. You would essentially -- if I want to have
22 \$10,000 five years from now, how much money do I need to put
23 in some investment to get to the \$10,000 as it earns
24 interest over those five years. It's going to be some
25 number less than 10,000.

1 Q. So that's the time value of money, basically.

2 A. Yes.

3 Q. All right. That is the last incremental step of the
4 calculation in table 2; right?

5 A. Yes.

6 Q. All right. So let go back to table 2 and talk about
7 that.

8 We're going to need, Karla, if you would, please,
9 if we can go up to the very top before we go to the body of
10 the document.

11 So let's talk about what is projected here for
12 this time period through the date of trial. You have listed
13 what is projected. Why don't you describe that.

14 A. Are you talking about the dollar amount?

15 Q. I'm talking about the 160,201. How do you get there?

16 A. Okay. I actually did two scenarios, two projections of
17 what Mr. Sanders' financial losses are. And one is based
18 upon his average earnings in the last two full years prior
19 to his termination, so that would be 2014 and '15. On
20 average in those two years he earned \$160,201.

21 So I used that figure to project what his earnings
22 might have been had he continued his employment with BNSF up
23 until the trial date. And so that projection of earnings is
24 what you see as column D, as in dog.

25 Again, this is the first scenario. I did another

1 scenario which I presume we're going to look at that.

2 Q. Yeah, we'll look at that too. But I assume that there's
3 going to be a question raised about using those numbers
4 because I think we have evidence in this case Mr. Sanders
5 worked a lot of overtime in those years. So why use those
6 years? Why not cast them aside?

7 A. Because I understand my role is to estimate his
8 capacity. What he was capable of, what he was able and
9 willing to do in order to earn money. And this apparently
10 is what he was doing. So this identifies what his earning
11 capacity is. So that's why I used the two figures in -- his
12 wages in 2014 and '15, the \$160,000. It showed what he's
13 capable of earning.

14 Q. And right at the tail end of the discovery period, do
15 you understand we received some comparators, other
16 employees, at that time unidentified. Apparently we have
17 them identified today. People who were hired before
18 Mr. Sanders and after Mr. Sanders. You've seen that
19 information as well; right?

20 A. Yes.

21 Q. So why not use these other people?

22 A. Because we're here to measure what Mr. Sanders' loss is
23 not somebody else's loss. That wouldn't make any sense. He
24 was doing the hard work. He was showing up and getting this
25 work done. So that's what we're going to be estimating, not

1 somebody else who wasn't apparently -- or may not have been
2 working as hard as he was.

3 Q. And what about during the years that Mr. Sanders -- do
4 we have information on those comparators? I think it's
5 called three up and three down, people who were hired
6 immediately before Mr. Sanders and immediately after
7 Mr. Sanders. Even during the period that he was working at
8 BNSF while he was still working there, how do those
9 comparator wages compare to Mr. Sanders?

10 A. For the years that I've seen in the document that you're
11 referring to, Mr. Sanders earned more, apparently worked
12 harder in every year except one, and that was in comparison
13 to one person. So each year we're comparing against six
14 other people, and there's maybe five or six years, seven
15 years, something like that, in which we're comparing his
16 earnings to everyone else's earnings, the three up and three
17 down in terms of seniority; and in every year he's earning
18 more than they are. He's working harder and apparently
19 longer.

20 Q. All right. Let go to the bottom of this -- let's go to
21 the body of the scenario so everybody can see how you walked
22 through this. And why don't you just tell us number in the
23 bottom right, \$693,660, just tell us how you got there.

24 A. That is the -- every year or time period that you see in
25 the left-most column, I'm calculating what the difference is

1 between what his wages and employee benefits might have been
2 had he stayed at BNSF compared to what he actually earned in
3 his subsequent employment. So I'm calculating that
4 difference in each year, and then summing up those
5 differences and that's what you see at the bottom of column
6 K, the \$693,660. That is his total lost backpay.

7 Q. And then if we go back to this calculation that you
8 described for us earlier on table 5, if we can pull up table
9 5. This number is the interest. Does that number get added
10 to the \$600,000 number that we looked at in terms of total
11 loss?

12 A. Yes, it is a component of loss.

13 Q. And then if we go to table 6, please. If we can just
14 look at the top. And we won't walk through this calculation
15 all the way through again. It's essentially the same
16 calculation; right?

17 A. Yes.

18 Q. But this time you're using a different -- a different
19 number for the purpose of that calculation, and the number
20 is based upon what?

21 A. I took an average of Mr. Sanders' earnings over a
22 six-year period, 2010 through 2015; and that average
23 earnings is the \$121,236 figure that you see.

24 Q. And then if we do the -- looking at the body of the
25 calculation again, if you use that number, \$121,236, then

1 your total lost backpay is what?

2 A. \$470,132.

3 Q. In any case, the calculation -- the structure of the
4 calculation otherwise is the same; right?

5 A. Yes. The only difference is the -- in this case I used
6 \$121,000; in the first scenario I used \$160,000 as his
7 potential BNSF earnings.

8 Q. All right. And so we won't go through all of that
9 again.

10 If we can go -- looks like I lost this page -- bit
11 if we can go to table -- I believe it's table 8. Why don't
12 we go to table 8, please?

13 And this is the total interest on lost backpay
14 using the same fundamentals of the calculation but a
15 different number for the purpose of the average; right?

16 A. Right. This is the lost -- the interest on the lost
17 backpay when I assumed that his earnings at BNSF would have
18 been \$121,000, whatever the rest of that is.

19 Q. Do these represent your opinion to a reasonable degree
20 of economic certainty as Mr. Sanders' loss to date of trial?

21 A. Yes.

22 Q. I'm going to ask you one more question or one more
23 series of questions, and that's -- just you're being paid
24 for your time here today; right?

25 A. Yes.

1 Q. And how much have you been paid in this case so far?

2 A. \$17,000.

3 Q. And how does that compare to a normal wrongful
4 termination case for you?

5 A. A normal wrongful termination case is maybe usually
6 around \$5,000. If it involves doing the Tier I and Tier II
7 calculations for retirement benefits, then it's usually a
8 little bit more. Anywhere from six to seven thousand. But
9 in this particular case, it's been going on awhile. I have
10 issued four reports because new information came in, time
11 changed, I think we got delayed because of COVID, the trial
12 got pushed back and so on and so forth. As more information
13 became available it was necessary to update the reports.

14 MR. JAMES KASTER: That's all the questions I have
15 for you, Dr. Boisso. Thank you.

16 THE COURT: Ms. Ferguson?

17 MS. FERGUSON: Thank you, Your Honor.

18

19 **CROSS-EXAMINATION**

20 BY MS. FERGUSON:

21 Q. Good morning, Dr. Boisso.

22 A. Good morning.

23 Q. Just to be clear, you're not here today to render any
24 opinions as to whether the termination by BNSF was
25 appropriate; correct?

1 A. That's correct.

2 Q. That's something that's left to the jury.

3 A. As I understand it, yes.

4 Q. And you are an economist so you are here to talk about
5 the numbers that you've run based on assumptions you've
6 made; correct?

7 A. Assumptions and data, yes.

8 Q. One of the assumptions you've made is that if
9 Mr. Sanders had stayed at BNSF, he would have earned between
10 120,000 and 160,000; correct?

11 A. Correct.

12 Q. And you relied for that 160,000 number on the wages he
13 earned in 2014 and 2016; correct?

14 A. That's correct.

15 Q. You're aware that those years were very high earning
16 years for track inspectors on the railroad because of the
17 oil boom that took place?

18 A. I don't know if they were high for track inspectors? I
19 have not seen any such information other than for
20 Mr. Sanders.

21 Q. That wasn't something that you took into account in
22 calculating the losses here.

23 A. I'm not certain what your question is. What do you mean
24 by calculating?

25 Q. Whether or not Mr. Sanders would have been able to

1 continue working those number of hours with a downturn in
2 the oil economy. You didn't take that into account.

3 A. Well, I do know that the railroad -- pardon me -- BNSF's
4 earnings or revenue and profit in the year that he was
5 terminated were relatively low. So if there was a boom in
6 the oil industry at that point and BNSF was transporting
7 that, it's certainly not reflected in their lower revenues.

8 Q. So my question really is your numbers don't take into
9 account the fact that in 2017, '18, '19, '20, '21, there
10 might have been less work available.

11 A. There might have been less work available. I don't know
12 that. But I also know that BNSF's profits and revenues
13 increased dramatically during that time period.

14 Q. So the answer to my question is you don't know whether
15 there would have been less work available in those years,
16 2017, '18, '19, '20 and '21?

17 A. I cannot say that for Mr. Sanders or anyone else.

18 Q. Well, are you aware of any track inspector in the Twin
19 Cities subdivision that earned a hundred thousand dollar in
20 the years 2017, '18, '19, '20 or '21?

21 A. I have information only for Mr. Sanders.

22 Q. So you don't have information that any track inspector
23 in the Twin Cities subdivision earned a hundred thousand
24 dollars in those years?

25 A. No, I don't.

1 Q. Okay. You did say that you reviewed what were
2 referenced as comparator documents, or the three above and
3 three below on the seniority list; correct?

4 A. I saw that table, yes.

5 Q. Okay. And are you generally familiar with how seniority
6 lists work for the railroad?

7 A. I'm not certain what you're asking, but I do have an
8 understand what seniority is.

9 Q. Okay. Well, if you have a recollection of what that
10 three above and three below -- three above would be people
11 higher on the seniority list, three below people lower on
12 the seniority list. Is that general understanding you have?

13 A. Yes.

14 Q. And you said you looked at those documents. I'll just
15 reference one employee by a number. Employee number 1.
16 You're aware that employee number 1 in the year 2016 earned
17 \$74,313.36?

18 A. I do not have that chart memorized. If you want to show
19 it to me?

20 MS. FERGUSON: I think there is an objection to
21 that chart?

22 MR. JAMES KASTER: Yes, I maintain an objection to
23 the chart, hearsay. No foundation. We didn't even have
24 names before this day.

25 MS. FERGUSON: I'll just ask him about numbers.

1 BY MS. FERGUSON:

2 Q. So you don't have that recollection. You did look at
3 the chart but you don't have that recollection?

4 A. Correct.

5 Q. Okay. And following through with employee number 1 in
6 the year 2017, do you have a recollection that the reported
7 earnings for a track inspector in 2017, employee number 1,
8 \$80,055?

9 A. 2017?

10 Q. Correct. I assume --

11 A. I don't recall seeing anything after 2016 on that table.

12 Q. Okay. So you're not aware that in the year 2018,
13 employee number 1 earned \$68,00.80 as a track inspector.

14 MR. JAMES KASTER: Object to counsel testifying.

15 The witness has no foundation.

16 THE COURT: Yes, sustained.

17 MS. FERGUSON: These records were provided to
18 counsel, and whether or not he chose to provide them to the
19 expert --

20 THE COURT: The expert's testified that he doesn't
21 have any recollection of this information.

22 BY MS. FERGUSON:

23 Q. So you haven't done any independent investigation to
24 determine what other track inspectors earned during those
25 years.

1 A. No, because that would be proprietary information that
2 would not be available to me from BNSF or those individuals.

3 Q. Did you do any research on your own as it related to
4 what opportunities there were in the railroad industry
5 post-termination as it related to track inspector jobs,
6 conductor training, yardmaster, other jobs in the railroad
7 industry?

8 A. That's not my area of expertise, so I don't have an
9 opinion as to whether those positions were available or
10 whether he would be able to achieve one of them.

11 Q. That would be more in the area of expertise of a
12 vocational expert?

13 A. Yeah, or an HR person, yes.

14 Q. BNSF isn't the only railroad in town, is it?

15 A. Not that I'm aware of, no.

16 Q. Okay. Did you review -- I think you said you reviewed
17 Suanne Grobe Ranheim's deposition and her reports?

18 A. Yes.

19 Q. She's the vocational expert retained by BNSF?

20 A. Yes.

21 Q. And you're aware that she concluded in her reports and
22 deposition that there are jobs available in the railroad
23 industry, and there have been jobs available, and those jobs
24 pay in the range of \$75,000 to \$88,000?

25 A. I remember reading that, yes.

1 Q. Your calculation of backpay does not take into account
2 any periods of time that Mr. Sanders may have been unable to
3 work to do other issues, personal or health-related issues?

4 A. Yes, actually it does.

5 Q. So what number did you put on that for a period of time
6 he's unable to work?

7 A. I did not include any calculation for what his BNSF
8 compensation might have been or what his earnings might have
9 been in mitigating. If you would look at table 2 or 6
10 again, you will see a gap halfway through the table. That's
11 the period when he was not medically available.

12 Q. And what period of time is that if you look at your
13 table?

14 A. It extends from November 1, 2017, through February 26,
15 2018.

16 Q. And any other periods of time after that?

17 A. No.

18 MS. FERGUSON: Okay. Thank you. Those are all
19 the questions I have.

20 MR. JAMES KASTER: A few follow-up, Your Honor.

21 THE COURT: One second, Mr. Kaster.

22 MR. JAMES KASTER: Sure.

23 (Pause)

24 THE COURT: Mr. Kaster?

25 MR. JAMES KASTER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. JAMES KASTER:

Q. With respect to the -- I think it's Grobe deposition that you were just asked about, you did review that; correct?

A. Yes.

Q. What did you observe in that deposition about her opinion about Mr. Sanders' earning capacity at the time of his termination?

A. She indicated that his earning capacity at the balance was in the range of \$160,000; same amount I did before I even saw her report.

Q. And in terms of Mr. Sanders, did she observe regarding whether or not he was medically able to work?

A. Yes, she made a statement in her first report that there is no -- how did she put it -- objective medical issue that would prevent him from working. Something to that effect.

Q. Let's go back to one fundamental about your report and your analysis that we should make sure that we talk about.

The number that you have used for Mr. Sanders for his earnings since the time of his departure from BNSF, what is that number and how did you calculate it?

A. Those, in each year since his termination, would be his actual earnings, his wages. And in only one instance for a relatively short period of time with a particular employer

1 did he have medical benefits, or any kind of benefits. None
2 of his ten employers during that time period paid into a
3 retirement system or matched a 401k. So basically all he
4 had was wages during that time period, and those are the
5 figures I used.

6 And then his wages ranged anywhere from about
7 \$40,000 to \$82,000 over those years. In the last year is
8 when he earned -- pardon me -- 2020 when he earned the
9 \$82,000, and that is the figure that I used for what his
10 earnings might have been here in 2021.

11 Q. So you've used, instead of an average of the numbers
12 going back, you've used the highest earnings that he made
13 previously before this year for the purpose of bringing us
14 to date; right?

15 A. That's correct.

16 MR. JAMES KASTER: That's all I have. Thank you.

17 THE COURT: Ms. Ferguson?

18 MS. FERGUSON: Nothing further.

19 THE COURT: Thank you.

20 Dr. Boisso, you may step down, sir.

21 THE WITNESS: Thank you.

22 THE COURT: Thank you.

23 MR. JAMES KASTER: Your Honor, I'm going to
24 discuss with the witness the Court's request before he
25 leaves.

1 THE COURT: All right.

2 MR. JAMES KASTER: If I can just have a moment?

3 THE COURT: Okay.

4 (Pause)

5 MR. JAMES KASTER: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. JAMES KASTER: Plaintiff has no further
8 witnesses at this time, Your Honor.

9 THE COURT: Understood.

10 Ms. Ferguson?

11 MS. FERGUSON: Yes. BNSF will call Magenta
12 Eggertsen by deposition.

13 THE COURT: All right.

14 MS. FERGUSON: Could we take just a moment to set
15 that up? We have a witness here.

16 MS. DONESKY: Would it make sense to take a short
17 break perhaps to get all set up?

18 THE COURT: Okay. We will take a ten-minute
19 recess at this time. We will return at approximately 10:35
20 for the resumption of this testimony.

21 (Recess taken at 10:23 a.m.)

22 * * * *

23 (10:35 a.m.)

24 IN OPEN COURT

25 (Without the Jury)

1 THE COURT: Please be seated, everyone.

2 Ms. Donesky?

3 MS. DONESKY: Yes, thank you, Your Honor. We've
4 been conferring together and since last evening just on
5 schedule, but we thought it would be beneficial to give you
6 an update. So for today's purposes, and we tried to obtain
7 someone remotely for today but we weren't able to do that.
8 But we have a schedule set up and we've conferred and it
9 seemed like it's agreeable to the plaintiffs counsel, but
10 today we will have the deposition read for Ms. Magenta
11 Eggertsen, but that will be for today. It likely will take
12 probably a good hour, I would think, it's quite lengthy,
13 maybe more.

14 For tomorrow though we have lined up Dr. Suanne
15 Grobe, Ms. Blaine Hoppenrath, Mr. Steven Chartier; and then,
16 time permitting, this Jason Randash who will testify
17 remotely. He was going to come but we've rearranged it.
18 We've tried to -- he'll just do it remotely, because he can
19 either do it tomorrow, and if not then, he could still be
20 available Monday to complete.

21 And then Monday we have scheduled Mr. Freshour.
22 And then we anticipate reading Mr. Jensen and having
23 Mr. Shearer and then Ms. Detlefsen on Monday. I don't want
24 to say that there isn't some minor witness or something else
25 in there. I don't want to say that's the exclusive list. I

1 don't know. But this is what we anticipate having.

2 I'm very hopeful, perhaps I'm being overly
3 optimistic, but I'm very hopeful we actually could get these
4 all done by Monday and have closings on Tuesday.

5 THE COURT: All right. But am I correct in
6 understanding that BNSF is not prepared to call anybody
7 beyond Ms. -- is it Eggertsen or Eggerton?

8 MS. DONESKY: Eggertsen, I believe. That's it,
9 Your Honor, for today.

10 THE COURT: Okay.

11 MR. JAMES KASTER: And I'll just add, Your Honor,
12 at the Court's wish, Dr. Boisso, his flight is at 6:00.
13 He's around if the Court chooses to take testimony. I
14 understand the Court may rather take -- might rather take
15 briefing on the subject of front pay.

16 THE COURT: I appreciate that, Mr. Kaster. I'll
17 make a decision on that here in the next hour or so, so that
18 we promptly let him know. Is there any chance he would take
19 an earlier flight if he could get one?

20 MR. JAMES KASTER: I don't know the answer to
21 that. I didn't ask him if he could get an earlier flight.
22 He didn't delay his flight. That was the flight that he's
23 on.

24 THE COURT: All right. I want to be respectful of
25 his time, as well.

1 MR. JAMES KASTER: Thank you.

2 THE COURT: All right. Anything further that we
3 need to cover with respect to any of these witnesses or
4 Ms. Eggertsen's deposition, particularly from the
5 plaintiff's side?

6 MR. LUCAS KASTER: I just wanted to say, Tracey, I
7 wasn't sure if you mentioned Mr. Chartier.

8 MS. DONESKY: I did for tomorrow. I thought I
9 did. Yeah, Chartier. Maybe I didn't. I just reversed
10 then. Chartier, yes.

11 THE COURT: I've got him down for tomorrow.

12 MS. DONESKY: For tomorrow, yep.

13 THE COURT: And the witnesses with respect to
14 Mr. Randash are in present -- are present and live, rather,
15 and Mr. Randash is live, though remote. Do I have that
16 right?

17 MS. DONESKY: That's correct.

18 THE COURT: And then on Monday, did I hear right
19 that there's one -- Mr. Jensen would be by deposition?

20 MS. DONESKY: That's correct.

21 THE COURT: And the others would be live?

22 MS. DONESKY: That's correct.

23 THE COURT: And in person, I take it.

24 MS. DONESKY: Correct.

25 THE COURT: All right.

1 MS. DONESKY: Your Honor, one request with respect
2 to the deposition. Would it make sense, we've talked
3 earlier as well and we have designations and
4 counter-designations. We've agreed I would just do the
5 question and the reader will answer. But given that the
6 plaintiff took the deposition, just to avoid confusion,
7 would there be any sort of explanation that this was a
8 deposition taken by plaintiff's counsel of Ms. Eggertsen?

9 I'm just trying to avoid any kind of usual
10 perception the jury might have that they might be confused
11 that I'm the one asking the question but it was asked by
12 plaintiff's counsel.

13 MR. JAMES KASTER: Your Honor, there's a standard
14 instruction.

15 THE COURT: It doesn't include that, but I'm about
16 to include it. I think that's worth mentioning. Do you
17 agree?

18 MR. JAMES KASTER: I don't, actually. I don't
19 think it's relevant who took the deposition. Not to the
20 witness's testimony. It's the requesting -- asking
21 questions. The lawyer's question is not evidence. So I
22 don't think it's relevant. I think the standard instruction
23 is appropriate.

24 THE COURT: Well, Mr. Kaster has a point there.
25 I'm not going to mention that to the jury. He's got a

1 point, both that the questions are not evidence, and he's
2 got a point that you're the one using this now, regardless
3 of who took the deposition to begin with. And he's also
4 right, as I observed, that the standard instruction in the
5 Eighth Circuit as modified a bit by the Third Circuit
6 instruction, because I think it gives the jury a bit more
7 helpful information. It does not include any mention of
8 that.

9 MS. DONESKY: I would point out that this is one
10 of the witnesses who plaintiff's counsel, as part of the
11 motion that we took out prior to trial, is one of the
12 witnesses who they wanted in their plaintiff's
13 case-in-chief.

14 THE COURT: No, I understand. Is it your
15 intention to read the whole thing?

16 MS. DONESKY: It's designated fairly thoroughly.
17 There's been a lot of clean up done. Objections are removed
18 in various places, but it is a largely designated
19 deposition.

20 THE COURT: All right. So in category of things
21 that I probably should know and don't, are there outstanding
22 objections that are going to surface during this testimony,
23 or have you cleaned all of them up?

24 MR. LUCAS KASTER: None from us, Your Honor.

25 MS. DONESKY: Yes, there's none. No issues there.

1 THE COURT: Terrific. Then let's get the jury in
2 here and let's proceed.

3 I do intend, by the way, to let the jury know that
4 there are no additional witnesses to be called today and
5 that we will resume tomorrow at 10:00 a.m.

6 MS. DONESKY: That's fine. Exactly why I thought
7 prior to bringing them back in that would be helpful to let
8 them know from a schedule standpoint.

9 THE COURT: All right. I'll let them know at the
10 conclusion of Ms. Eggertsen's testimony.

11 MS. DONESKY: All right.

12 MR. JAMES KASTER: Thank you, Your Honor.

13 (Jury enters)

14 THE COURT: Thank you, everyone. Please be
15 seated.

16 Ms. Donesky, am I correct that you've got someone
17 who will be in the witness box with us?

18 MS. DONESKY: Yes, we do, Your Honor.

19 THE COURT: Okay. Let me just instruct the jury
20 now about what's about to happen.

21 Members of the jury, testimony is about to be
22 presented to you here at trial in the form of a deposition.
23 A deposition is the recorded answers a witness made under
24 oath to questions asked by lawyers before trial. In a
25 deposition the witness is placed under oath and swears to

1 tell the truth, and lawyers for each party may ask
2 questions. A court reporter is present and records the
3 questions and the answers so that there is a transcript, and
4 that is the transcript from which this deposition testimony
5 will be read here today.

6 The deposition testimony of Ms. Magenta Eggertsen,
7 which was taken on October 11th, 2018, is about to be
8 offered and will be read to you.

9 To make the deposition testimony somewhat
10 realistic, the party presenting the deposition testimony
11 here, BNSF, is having an individual play the role of
12 Ms. Eggertsen. You should consider the deposition testimony
13 and judge its credibility as you would that of any witness
14 who testifies here in person. You should not, however,
15 place any significance on the manner or tone of voice used
16 to read the witness's answers to you.

17 Ms. Donesky?

18 MS. DONESKY: Thank you, Your Honor.

19 THE COURT: You may be seated.

20 THE READER: Thank you, Your Honor.

21 **(MAGENTA ROBERSON)**

22 **DIRECT EXAMINATION**

23 BY MS. DONESKY:

24 Q. Good morning. Can you state and spell your name for the
25 record?

1 A. Magenta, M-A-G-E-N-T-A. Last name is Roberson,
2 R-O-B-E-R-S-O-N.

3 Q. If you are comfortable, yes, you may remove your mask.
4 Thank you.

5 Ms. Roberson, my misunderstanding is you used to
6 go by Eggertsen, your last name.

7 A. Correct.

8 Q. Can you spell that for me?

9 A. E-G-G-E-R-T-S-E-N.

10 Q. Were there multiple emails and complaints that you
11 reviewed?

12 A. Yes. I reviewed two different complaints.

13 Q. And what were the two complaints?

14 A. The original complaint that I -- the first complaint I
15 reviewed was a complaint where I had met with Mr. Sanders.

16 Q. And what was Mr. Sanders complaining about?

17 A. How he was being treated by management.

18 Q. Do you recall when that occurred?

19 A. I wouldn't be able to give an exact date without looking
20 at my notes.

21 Q. Do you recall approximately after reviewing your notes
22 when that occurred?

23 A. It's December of 20 -- I would have to look at the year.
24 I believe 2015, but could have been 2016.

25 Q. And then you said there was a second complaint?

1 A. Yes.

2 Q. And what was that?

3 A. Regarding being able to use the company vehicle.

4 Q. Do you recall when that happened, approximately?

5 A. It was the spring of the following year of the original
6 complaint.

7 Q. I want to talk a little bit about your background.

8 What's your current employment?

9 A. I'm an HR manager.

10 Q. Where at?

11 A. Vulcan Materials Company.

12 Q. Falcon?

13 A. Vulcan, V-U-L-C-A-N.

14 Q. And where is that located?

15 A. It's headquartered in Birmingham, Alabama. I work here
16 out of Las Colinas.

17 Q. How long have you been there?

18 A. Since August of 2018.

19 Q. And where were up employed before that?

20 A. BNSF Railway.

21 Q. When did you start with BNSF?

22 A. In May 2013.

23 Q. And then did you leave in August of 2018?

24 A. Yes.

25 Q. During that approximately five years, can you just tell

1 me what roles or what positions you held?

2 A. I held multiple roles. When I started, I started as a
3 management trainee, and then had promoted within the company
4 through different positions. And then I went to a senior HR
5 generalist this summer, and that's when I was relocated to
6 Minneapolis. And then I stayed there for 11 months, and
7 then I came back to Ft. Worth and was in an HR generalist
8 role with BNSF before moving into an HR manager role.

9 Q. So you said you were in Minneapolis for 11 months,
10 approximately?

11 A. Yes.

12 Q. Can you give me the time frame when you were there?

13 A. I always get this confused. Started up there in
14 August of 2015 and then moved back to Texas in the summer of
15 2016.

16 Q. I'll ask it in a broader sense. Did you deal with Mr.
17 Sanders or his employment with BNSF in any respect after you
18 moved back to Texas in the summer of 2016?

19 A. No.

20 Q. Did you deal with Mr. Sanders at all, and with respect
21 to his employment with BNSF, prior to when you moved to
22 Minneapolis in August of 2015?

23 A. No.

24 Q. So fair to say that the only time you dealt with
25 Mr. Sanders with respect to his employment with BNSF was

1 during that approximately 11 months when you were in
2 Minneapolis?

3 A. Yes.

4 Q. Had you worked in an HR function prior to joining BNSF?

5 A. No, I came right out of school.

6 Q. Why don't you just detail for me what your educational
7 background is.

8 A. I have a bachelor's in business administration from
9 Central Michigan University, with a major in human resources
10 management.

11 Q. You said that you started with BNSF as a management
12 trainee in about May of 2013?

13 A. Yes.

14 Q. And then you became a senior HR generalist up in
15 Minneapolis in August of 2015, approximately?

16 A. Yes.

17 Q. Did you hold an HR role between those two times?

18 A. Yes.

19 Q. Were you always employed in the HR division or group?

20 A. Yes.

21 Q. What were your roles? You said you kind of held
22 multiple of various roles between that time. What were your
23 roles that you held between when you were a management
24 trainee and when you moved to Minneapolis?

25 A. I started as management trainee in a group that was

1 responsible for the preemployment process for our hourly
2 employees, and then I moved into recruiting functionality.
3 And then I -- during that time I was promoted to a staffing
4 specialist. And then I moved to a senior specialist role
5 supporting college recruiting, which included our management
6 trainees and our interns. And then I moved to the
7 generalist role.

8 Q. Do you remember when you moved -- first moved to
9 generalist role?

10 A. When I moved to Minnesota.

11 Q. In these initial positions before you moved to
12 Minnesota, it seems like most of them dealt with bringing
13 new employees on at BNSF. Is that -- did I get that
14 correctly?

15 A. Yes.

16 Q. During that time, so still before you moved to
17 Minnesota, were you provided any training about how to
18 conduct an internal investigation regarding the complaint
19 from an employee at BNSF?

20 A. Broadly, and it wasn't until I moved to my role that I
21 received more detailed training on the complaint process.

22 Q. When you moved to the generalist role?

23 A. Yes.

24 Q. So when you moved to the generalist role, what training
25 were you provided in terms of investigating a complaint by a

1 BNSF employee?

2 A. It was on-the-job training, discussing different
3 processes that we're expected to follow and where to be able
4 to find different policies or procedures that might be
5 helpful to be able to look into concerns.

6 THE COURT: Mr. Donesky, sorry to interrupt. Can
7 I ask the reader to move a little closer to the microphone?
8 Thank you.

9 BY MS. DONESKY:

10 Q. Thank you. Was there any type of policy or handout that
11 you were given about saying when you get a complaint from an
12 employee, here are the steps that you should take to conduct
13 an investigation?

14 A. I can't recall.

15 Q. Have you ever seen an internal policy that details the
16 steps that should be taken after a BNSF employee files a
17 complaint with HR?

18 A. I can't say for certain.

19 Q. During your employment, and let's just stick to your
20 time in Minneapolis, did you receive other complaints from
21 employees besides Mr. Sanders?

22 A. Yes.

23 Q. Did you have a standard protocol for how you went
24 going -- how you went about conducting an investigation?

25 A. Could you rephrase it?

1 Q. Sure. Did you have a standard practice when somebody
2 would file a complaint about another -- let's just say it's
3 about another employee. Did you have a standard practice or
4 procedure that you followed to do your investigation?

5 A. I had an outline that I would follow in terms of
6 mentally what I knew I needed to be able to do.

7 Q. Do you recall what was in that outline?

8 A. It wasn't a formal document outline, but it would be
9 talking to the individual that had a concern; able to gather
10 additional details from them regarding their complaint; and
11 then it would be taking the information that I was given
12 with the original complaint; and then being able to reach
13 out or find different policies or information that would be
14 helpful to be able to do a complete investigation on the
15 complaint, which could include reviewing documents,
16 interviewing witnesses and different -- well, those would be
17 the two main things.

18 Q. Did somebody at BNSF give you that type of outline or
19 explain to you that that was the steps that you should take
20 or is that just something you came up with as part of your
21 education and training?

22 A. As -- as I was new to the role, it was on the job of my
23 superior explaining what a complaint would look like in
24 terms of the process that we would follow.

25 Q. Who was your supervisor?

1 A. Terry Morgan.

2 Q. And what was his position?

3 A. He was an HR director.

4 Q. So he was your direct report?

5 A. My direct supervisor.

6 Q. So if you were doing an investigation regarding a
7 complaint, most of your information was given to Mr. Morgan?

8 A. We would review what I found during an investigation,
9 yes.

10 Q. How about with respect to Mr. Sanders?

11 A. My complaint that I worked with Mr. Sanders was mostly
12 discussed within -- with Terry.

13 Q. Can you recall ever having a discussion with somebody
14 else within HR regarding Mr. Sanders' complaints besides
15 Mr. Morgan?

16 A. Complaints in general or --

17 Q. Correct.

18 A. I would talk with Joe Spire.

19 Q. And who is Mr. Spire?

20 A. He was an HR manager reporting to Terry Morgan.

21 Q. Did Mr. Spire do any of the actual investigation as far
22 as you know with respect to Mr. Sanders' complaints?

23 A. The actual investigation I handled for the two
24 complaints.

25 Q. Did you have an in-person meeting with Mr. Sanders at

1 some point?

2 A. Yes.

3 Q. And I just want to clarify something. I'm assuming,
4 based on your previous testimony, that you don't recall how
5 that meeting came about, who initiated it, how that was
6 organized, but tell me if I'm wrong.

7 A. Correct. I don't recall how it was, the original
8 complaint of that he wanted to talk to HR.

9 Q. So the first thing you kind of remember regarding his
10 complaint is having this sit-down in person with
11 Mr. Sanders; is that fair?

12 A. Yeah.

13 Q. Why don't you explain to me what happened during the
14 sit-down.

15 A. I would have to review my notes for specific information
16 regarding how the meeting went, but I went to his work
17 location and met with him to discuss how he was being
18 treated and felt he was being treated by management.

19 Q. Did he name any individuals?

20 A. He named Keith Jones, and I can't recall if there was
21 other people that he named at that point.

22 Q. Do you recall if he named Blaine Hoppenrath?

23 A. I would have to look at my notes but that was his direct
24 supervisor.

25 Q. When you say Mr. Sanders was complaining about how he

1 was being treated, what was he saying in terms of what
2 Mr. Jones or anybody else that complaining about was doing
3 to him?

4 A. Would I be able to review my notes?

5 Q. Sure. You've been handed what has been marked as
6 Exhibit 42, which is four-page typed document. Doesn't have
7 anybody's name on it in terms of offering it. Do you recall
8 if this is your notes regarding your conversation with
9 Mr. Sanders?

10 A. Yes.

11 Q. Do you recall when you created this typed-up document?

12 A. The same day that I met -- close to or the exact same
13 day that I met with Don. It was my notes during the
14 conversation.

15 Q. And were you actually typing these up as you had the
16 conversation with Mr. Sanders?

17 A. Yes.

18 Q. Who is Mr. Freshour?

19 A. He was Terry Morgan's supervisor.

20 Q. Do you remember what his title was?

21 A. Regional -- like regional HR director is what we called
22 him.

23 Q. And so then we go -- the fourth entry is December 7th,
24 2015, where there's an overview of Mr. Sanders's contacting
25 you to talk about his complaints about Mr. Jones. Is that

1 right?

2 A. Yes.

3 Q. Did Mr. Sanders provide you any documents during your
4 meeting with him on December 7th of 2015?

5 A. No physical documents. I did listen to recordings.

6 Q. Do you remember how many recordings you listened to?
7 And you can take a second to review that if you need to.

8 A. Five.

9 Q. So let's just kind of -- I want to make sure we're on
10 the same page with respect to the five recordings. So I see
11 kind of on the first page, and there's a Bates number on the
12 bottom right-hand corner. It says BNSF Sanders. It should
13 end in numbers 7084; is that right?

14 A. Yes.

15 Q. Okay. That'll just help us as we go through to make
16 sure we're all on the same page because there's not separate
17 page numbers on here.

18 So on that page ending in 84, the first date after
19 December 7th which at the very top of the page is November
20 30th, 2000, and says: "Conversation between Don and Keith
21 and it was okay." Is that what you wrote?

22 A. Yes.

23 Q. Is the summary that follows a summary of a phone call
24 that you listened to between Mr. Sanders and Mr. Jones that
25 occurred on November 30th of 2015?

1 A. Yes.

2 Q. Okay. And you actually physically listened to that
3 conversation during your meeting with Mr. Sanders; is that
4 right?

5 A. From my notes, yeah.

6 Q. Do you know how those recordings were played for you?
7 Did Mr. Sanders play them from his phone? Did he have a
8 separate recording device?

9 A. I don't remember.

10 Q. Did you ask for copies of the recordings?

11 A. I don't remember if I did.

12 Q. Did you ever provide any recordings to your bosses in
13 HR?

14 A. No.

15 Q. Why not?

16 A. I didn't have the recordings.

17 Q. Did any of your superiors ever ask for you to get copies
18 of the recordings?

19 A. I don't know.

20 Q. Are you aware if any of your bosses ever heard --
21 actually heard these recordings?

22 A. I don't know.

23 Q. As far as you can recall, did any of your bosses come to
24 you and say, "Can you go back to Mr. Sanders and get these
25 recordings and, you know, if he has any other recordings can

1 you get those too?" Did anybody ever say that to you?

2 A. I don't know.

3 Q. So for -- we have the first phone call or one of the
4 phone calls that you listened to, November 30th of 2015. Do
5 you see that?

6 A. Yes.

7 Q. And then the next, there seems to be a summary after
8 that. And then the next date is November 23rd of 2015 and
9 you write: "Conversation between Don and Keith regarding
10 the FRA." Is that right?

11 A. Yes.

12 Q. Is that another phone call that you listened to between
13 Mr. Sanders and Mr. Jones that occurred on November 23rd of
14 2015?

15 A. Yes.

16 Q. And then there appears to be some handwritten note and
17 summary of that phone call. Are those your notes regarding
18 tat phone call that you listened to?

19 A. Handwritten?

20 Q. Or typed up.

21 A. Okay. Yes.

22 Q. That was the conversation that Don and I would have --
23 sorry.

24 A. That was the conversation that Don and I would have had.

25 Q. So the summary of the actual phone call that you

1 listened to is in the paragraph form and then the bullet
2 points are your discussion with Mr. Sanders.

3 A. Yes.

4 Q. Then the next date, which is near the bottom of that
5 second page, is December 3rd, 2015; and it says,
6 "Conversation between Don and Keith." Do you see that?

7 A. Yes.

8 Q. Is that a third phone call that you listened to between
9 Mr. Sanders and Mr. Jones that occurred on December 3rd,
10 2015?

11 A. Yes.

12 Q. And then what follows there is again a description in
13 paragraph form. Is that your summary of that phone call?

14 A. Yes.

15 Q. The December 3rd phone call?

16 A. Yes.

17 Q. And then same thing. The bullet points under that are
18 now your conversation with Mr. Sanders during this meeting
19 on December 7th?

20 A. Yes.

21 Q. Then there's two more sort of headings on this third
22 page ending in 7086. The first one says: "Conversation with
23 Keith and Don." And the next one says: "Conversation with
24 Blaine and Don." Were those also recordings?

25 A. Yes.

1 Q. Okay. And then you have paragraph summaries of both of
2 those recordings that follow that; is that correct?

3 A. Yes.

4 Q. So those are the five recordings that you listened to
5 during your meeting with Mr. Sanders.

6 A. Yes.

7 Q. And then the last heading on the final page, which is
8 7087, says: "Conversation with Don after the conversations:
9 I'm assuming that after listening to the recordings, you had
10 further conversation with Mr. Sanders during your meeting?

11 A. Yes.

12 Q. And that's the summary of that that follows that
13 heading?

14 A. Yes.

15 Q. I want to kind of go back to the first page now and I'd
16 kind of like to take these in order; and so if you need to
17 review something you can just review that section, you don't
18 have to read the whole thing again.

19 With respect to the call on November 30th of 2015,
20 was there anything that you heard during that phone call
21 that you felt was inappropriate?

22 A. And what was the original question you had asked?

23 Q. Was there anything with respect to the conversation with
24 Mr. -- between Mr. Sanders and Mr. Jones that you felt was
25 inappropriate? Let's just say on the part of Mr. Jones.

1 A. Yes.

2 Q. And what was that?

3 A. Comments regarding another employee.

4 Q. Is that with respect to I think it says Kramer. Is that
5 Mr. Kramer or do you know?

6 A. I don't remember who it is, but another employee
7 nonetheless. And then I would also say inappropriate for
8 the overall communication of being able to say -- Keith
9 saying that "You're making me look like an idiot."

10 Q. Do you have any sense of why Mr. Jones was telling
11 Mr. Sanders, "You're making me look like an idiot"?

12 A. That would be out of my scope of responsibility.

13 Q. Okay. Did you ever have a conversation with Mr. Jones
14 about these phone calls?

15 A. Me personally? No.

16 Q. So you didn't have any explanation in terms of -- from
17 Mr. Jones about why he might have been saying some of the
18 things that you reference in these phone calls?

19 A. No.

20 Q. And I want to try to clarify one thing. With respect to
21 these recordings that you listened to during this meeting,
22 do you recall physically taking a copy of these at all from
23 Mr. Sanders?

24 A. I couldn't -- I don't believe so, no.

25 Q. So with respect to this call on November 30th of 2015

1 you said -- at least you identified two things that you felt
2 were inappropriate is referencing or talking about this
3 other employee, Mr. Kramer; is that right?

4 A. About the other employee? Yes.

5 Q. And then Mr. Jones saying something to Mr. Sanders about
6 Mr. Sanders making Mr. Jones look like an idiot; right?

7 A. Yes.

8 Q. Anything else that you felt was inappropriate during
9 this phone call?

10 A. No.

11 Q. And I'm just -- my assumption is based on your reviewing
12 of this document. Are you relying on, when you say you
13 think these two things were inappropriate, are you relying
14 upon your notes or do you have independent recollection of
15 actually listening to that recording?

16 A. Relying on my notes.

17 Q. So based, as far as you can recall right now, you don't
18 remember, for example, the tone of voice or other things
19 that may have been said that aren't reflected in your notes?

20 A. No.

21 Q. After each of -- let's just start with this one. After
22 the call on November 30th of 2015, did you stop and have a
23 conversation with Mr. Sanders and ask him, you know,
24 "Explain to me what you felt was wrong about this call," or
25 anything like that. I don't see anything in your notes. Do

1 you recall having a discussion with Mr. Sanders about that?

2 A. I don't recall.

3 Q. I want to go to the second phone call on this page, to
4 November 23rd, 2015. Call between Mr. Sanders and
5 Mr. Jones, and you say it's regarding the FRA. Do you see
6 that?

7 A. Yes.

8 Q. Is there anything in that phone call, at least from your
9 review of your notes, that you felt was inappropriate?

10 A. Yes.

11 Q. And what was that?

12 A. I recall this conversation being heated and then there
13 are several comments that I would take exception to.

14 Q. Comments by whom?

15 A. Mostly Keith Jones and then one comment by Mr. Sanders.

16 Q. What's the one comment by Mr. Sanders?

17 A. That, "I don't understand why everyone here hates me. I
18 get absolutely no help from you or Blaine."

19 Q. Why do you take exception with that or why do you think
20 it's inappropriate?

21 A. From the context of the rest of the conversation.

22 Q. What do you mean by that?

23 A. The comment saying that he's getting no help, but then
24 there are additional notes that support that he did have
25 support by Mr. Jones and Ms. Hoppenrath.

1 Q. When you say the exchange was heated, what do you mean
2 by that?

3 A. It was a tense conversation between Mr. Jones and
4 Mr. Sanders.

5 Q. Did you get the sense that either of them was upset?

6 A. I just recall overall that there was -- it was heated,
7 so frustrations; and the notes support that there was
8 frustrations between the two parties.

9 Q. And what I'm trying to decipher is based on what you
10 recall, I think you said before that you recall this
11 conversation actually listening to it; is that right?

12 A. Yes, vaguely remember.

13 Q. Sure, sure. Do you recall in terms of with respect to
14 frustration or being heated, are you saying that there was
15 raised voices?

16 A. I don't recall if there was raised voices.

17 Q. Was there frustration from one party or both parties?

18 A. My notes show for certain that there was frustration by
19 Mr. Jones. I don't know on Mr. Sanders.

20 Q. So you pointed out I think the one comment, at least
21 from your notes, that you recall from Mr. Sanders that you
22 thought was somewhat inappropriate; right?

23 A. Yes.

24 Q. Were what the comments, at least from your notes, and if
25 you recall anything else besides what's in your notes please

1 tell me. But what from your notes do you recall or do you
2 observe that Mr. -- was inappropriate by Mr. Jones?

3 A. The language. So, "You're damn right that you do."
4 Keith's comment that, my notes show, "Obviously you don't
5 give two shits about BNSF." Keith's -- my notes saying that
6 Keith said, "I don't understand why there's so much drama
7 with you," comment about motive.

8 Q. Where do you see that?

9 A. Towards -- seven lines up from the bottom. "You have
10 your whole motive." It's at the end of that.

11 Q. Okay.

12 A. Those were the notes that I would take exception with.

13 Q. When they are talking about in your notes, there's some
14 reference to what appears to be speed: 25, 50, that sort of
15 thing. Do you see that?

16 A. Yes.

17 Q. Do you know what they're referring to?

18 A. It would have been the track speed.

19 Q. What do you mean by track speed? Are they talking about
20 the maximum speed that's allowable? Are they talking about
21 a slow order? Are they -- can you explain?

22 A. Just the speed on the tracks. Outside of that would be
23 outside of my scope.

24 Q. Do you know how reporting of defects or slow orders
25 works?

1 A. That would be outside of my scope.

2 Q. Do you know what Mr. Sanders' job position was?

3 A. Yes.

4 Q. And what was that?

5 A. He was a track inspector.

6 Q. Do you know what track inspectors do?

7 A. In a broad overview of inspecting the track to look for
8 defects.

9 Q. Do you know that they report defects then when they
10 observe them?

11 A. Yes.

12 Q. Do you know that if appropriate at times they can put a
13 slow order on a section of track because of a defect?

14 A. Yes.

15 Q. What's your understanding of what a slow order is?

16 A. It's to authorize speed on the tracks.

17 Q. Okay. Do you recall outside of your notes ever getting
18 that impression from listening to the phone call that you
19 felt like Mr. Jones was trying to dissuade Mr. Sanders from
20 entering the slow order or reporting a defect?

21 A. Not that I recall.

22 Q. Did you -- you referenced earlier a section in
23 Mr. Jones's -- or your description of Mr. Jones's comment
24 where he says, "Obviously you don't give two shits about
25 BNSF." Do you see that?

1 A. Yes.

2 Q. Sure. What I'm wondering is, did you ever find out why
3 Mr. Jones was saying that to Mr. Sanders, why he was telling
4 Mr. Sanders, "I don't think you give two shits about BNSF."

5 A. It would be the context of the conversation.

6 Q. With respect to Mr. Sanders contacting the FRA?

7 A. Yes, correct.

8 Q. From your recollection of -- and I'm going to separate
9 from reading your notes -- from your recollection of
10 listening to that phone call, did you get the impression
11 that Mr. Jones was upset about Mr. Sanders contacting the
12 FRA?

13 A. The context in which the FRA was contacted; not that the
14 FRA was contacted.

15 Q. Contacted?

16 A. Contacted.

17 Q. What do you mean by the context?

18 A. That from my recollection, that Mr. Jones wanted to be
19 able to be aware of the situation before going to the FRA.

20 Q. Your impression of what was happening during the phone
21 call was that Mr. Jones was upset, not that Mr. Sanders had
22 actually called the FRA, but that Mr. Sanders had called the
23 FRA without including Mr. Jones?

24 A. That Mr. Jones wanted Mr. Sanders to have an internal
25 conversation regarding the concerns before going directly to

1 the FRA.

2 Q. Did you take exception or do you find appropriate
3 Mr. Jones swearing at Mr. Sanders?

4 A. Do I take exception?

5 Q. Correct.

6 A. Yes.

7 Q. And do you think that that's -- from your HR perspective
8 and training, do you think that that's an appropriate way to
9 act with a subordinate?

10 A. No.

11 Q. Did you understand that Mr. Jones was Mr. Sanders'
12 superior?

13 A. Yes.

14 Q. I'd like to turn to that second page, and in your first
15 full sentence on that page you indicate that Mr. Jones --
16 your notes indicate that Mr. Jones said to Mr. Sanders, "I
17 don't want you doing that," with respect to Mr. Sanders
18 calling the FRA. Do you see that?

19 A. I see my notes.

20 Q. As far as you can recall, do your notes accurately
21 reflect what was discussed during these phone calls?

22 A. Yes.

23 Q. As far as your notes say, Mr. Jones didn't say, "I don't
24 want you doing that unless you come and talk to me first,"
25 right?

1 A. The context of all the notes show that Mr. Jones is
2 wanting Mr. Sanders to come to him before going to the FRA.

3 Q. That's your understanding?

4 A. Correct.

5 Q. Mr. Sanders, if we kind of go down on the second page
6 again, Mr. Sanders kind of in the third or fourth sentence
7 says something to the effect of, "Every time I have tried to
8 fix the track you shut me down." Do you see that?

9 A. Yes.

10 Q. Does that statement concern you at all?

11 A. It would raise a flag, but not concern.

12 Q. Did you provide these written notes to any of your
13 superiors?

14 A. Yes.

15 Q. Do you recall who?

16 A. I would have for sure provided it to Terry Morgan.

17 Q. From an HR perspective with BNSF, does it concern you if
18 a track inspector says to his superior, "When I'm trying to
19 fix the track you shut me down." Does that raise any red
20 flags for you?

21 A. It would raise a flag in terms of making sure our
22 employees have the correct training to be able to do their
23 job.

24 Q. Which employee?

25 A. In this case Mr. Sanders.

1 Q. Does it raise any concerns about Mr. Jones?

2 A. If that was accurate, that would, yes.

3 Q. I'm just saying does it raise a red flag for you with
4 respect to Mr. Jones's sort of interaction with Mr. Sanders?

5 A. If Mr. Jones wasn't allowing Mr. Sanders to perform his
6 job, yes.

7 Q. And then right after that you say, "Keith" -- is that
8 saying that Mr. Jones is speaking again?

9 A. Yes.

10 Q. And it says, "I don't understand why there's so much
11 drama with you." Do you see that?

12 A. Yes.

13 Q. And I think that was one of the statements that you
14 identified as something you took issue with?

15 A. Yes.

16 Q. And one of the things I want to clarify is when you say
17 you took issue with something, or you find it inappropriate,
18 are you saying from an HR perspective you would say that
19 that statement's inappropriate?

20 A. Correct.

21 Q. Why do you find that that statement is inappropriate?

22 A. Because it's not respectful.

23 Q. Now, if we go down a little bit further, there is a
24 reference, I think to Mr. Jones, saying something about,
25 "You have your whole motive," referring to Mr. Sanders. Do

1 you see that?

2 A. Yes.

3 Q. Do you have any understanding of what Mr. Jones was
4 saying there about Mr. Sanders' motive?

5 A. I don't.

6 Q. Why do you -- I think that was one of the things you
7 identified as that you thought was potentially
8 inappropriate. Why did you say that?

9 A. To tell somebody that they have another motive isn't
10 respectful.

11 Q. Did you interpret that to mean that Mr. Jones was
12 slaying to Mr. Sanders, "I think you have an improper motive
13 or bad motive?" Was that your interpretation?

14 A. I don't know if that was my interpretation.

15 Q. A little bit further down in that paragraph there's a
16 sentence that you write, which I think is Mr. Jones
17 speaking, where you write, "I have never felt more betrayed
18 when you called the FRA." Do you see that?

19 A. I see that.

20 Q. Is that Mr. Jones speaking something to that effect?

21 A. Yes.

22 Q. Do you take issue with that?

23 A. In the context of this entire conversation, not
24 necessarily, no.

25 Q. And why is that?

1 A. Because the conversation started with Mr. Jones wanting
2 Don -- wanting Mr. Sanders to have a conversation with him
3 and huddle within the team before going directly to the FRA.

4 Q. Do you think that type of statement by a superior could
5 potentially dissuade a subordinate from contacting the FRA?

6 A. In the context of the conversation, I wouldn't say so,
7 no.

8 Q. So then there's the bullet points under the paragraph
9 form. And I think you said before that this is sort of a
10 summary of a follow-up conversation with Mr. Sanders?

11 A. Yes.

12 Q. Okay. Do you know if this is you speaking, Mr. Sanders
13 speaking?

14 A. These notes would have been Mr. Sanders speaking.

15 Q. Do you know if you had asked him a question about
16 explain something, anything like that. What led Mr. Sanders
17 to go down this road?

18 A. I'm not sure.

19 Q. I want to go back to Exhibit 42, which is your notes
20 from your meeting with Mr. Sanders on December 7th of 2015.
21 And we kind of finished up with this conversation, or your
22 summary of a phone call that you listened to from November
23 23rd of 2015, and the next one is December 3rd of 2015. Do
24 you see that?

25 A. Yes.

1 Q. Was there anything inappropriate from that phone call
2 from either your recollection or your notes?

3 A. And you asked if I took exception to anything?

4 Q. Correct.

5 A. Yes.

6 Q. And what is that?

7 A. The language and Mr. Jones speaking regarding another
8 employee to another employee.

9 Q. Whose language do you take exception to?

10 A. Mr. Jones's.

11 Q. Do you recall Mr. Sanders using any language that you
12 felt was inappropriate?

13 A. Not from my quick glance at the notes.

14 Q. Do you have any independent recollection of Mr. Sanders
15 doing so outside of what's in your notes?

16 A. I don't recall.

17 Q. And then if we go a little bit further it says "Keith--"
18 and then some summary later or that follows. Is that
19 Mr. Jones speaking?

20 A. Yes.

21 Q. And Mr. Jones says something to the effect, according to
22 your notes, "I know that Kramer isn't working as much as he
23 should." Do you see that?

24 A. Yes.

25 Q. Do you know if Mr. Jones is talking about the same

1 Kramer who he had referenced before in earlier
2 conversations?

3 A. I don't know.

4 Q. Do you have any knowledge of whether this Kramer
5 individual was -- was or was not working as much as he
6 should?

7 A. I don't know.

8 Q. Mr. Jones goes on and says -- I think with respect to
9 Mr. Kramer but you can tell me if you think differently
10 according to your notes -- that Mr. Kramer "is going to weld
11 until he fucking falls over." Do you see that?

12 A. Yes.

13 Q. As far as you can recall, did Mr. Jones actually say
14 "fucking fall over"?

15 A. According to my notes, yes.

16 Q. Does that concern you at all?

17 A. Yes.

18 Q. Why?

19 A. Because that's not appropriate for a leader and it's
20 disrespectful.

21 Q. What's not appropriate about it?

22 A. Using that language.

23 Q. Any concerns about a manager saying that he's going to
24 make an employee work "until he fucking falls over"?

25 A. I think that's taken out of context based on the notes.

1 Q. What do you mean?

2 A. So it says "Keith -- I know that Kramer isn't working as
3 hard as he should. I'm going -- he is going to weld until
4 he fucking falls over." Without listening to the recording
5 I don't see that -- my notes don't say that Mr. Jones said
6 he was going to work him until he falls over.

7 Q. You don't interpret it that way?

8 A. No.

9 Q. Does it raise any concerns for you about Mr. Kramer's
10 health or safety when a manager says that?

11 A. That's not what I was taking exception to.

12 Q. You don't take exception to that at all?

13 A. If there was something else going on, then that would be
14 a concern.

15 Q. What do you mean "something else going on"?

16 A. If Mr. Kramer was in a situation that he was going to
17 fall over, that would be a concern.

18 Q. But nothing about Mr. Jones potentially saying I'm going
19 to have another employee work until he fucking falls over
20 about -- makes you concerned about that person, be concerned
21 about that employee's health and safety under this person's
22 direction?

23 A. It goes back to context. I don't say -- my notes don't
24 say that Mr. Jones said he was going to make Mr. Kramer fall
25 over.

1 Q. Do you know if Mr. Jones is Mr. Kramer's supervisor?

2 A. What was that?

3 Q. Do you know if Mr. Jones is Mr. Kramer's supervisor?

4 A. I don't know.

5 Q. Does that impact your analysis at all?

6 A. No.

7 Q. Do you recall if Mr. Jones was angry or appeared or
8 sounded frustrated during this section of the call?

9 A. I don't know.

10 Q. Do you interpret this statement by Mr. Jones to be a
11 threat against Mr. Kramer in any respect?

12 A. A threat? No.

13 Q. The top of the next page, which is the Bates number
14 7086, on the bottom right-hand corner there's some
15 discussion between Mr. Sanders and Mr. Jones about a frog
16 and something that night. Did you understand the context of
17 what they were talking about?

18 A. That they were going to put in a frog at night; but
19 outside of that, no.

20 Q. Did you get the sense that Mr. Jones was giving
21 Mr. Sanders a hard time at all about putting on slow orders,
22 reporting defects at night or during the day? Did you ever
23 get that impression?

24 A. I don't know.

25 Q. If we go a little bit further down you write a section,

1 I think of Mr. Jones speaking, where you said -- it says.

2 "I caught Kramer on a lying. He is lying and is now up for
3 investigation." Do you see that?

4 A. Yes.

5 Q. Do you have any knowledge of that investigation or that
6 accusation by Mr. Jones against Mr. Kramer?

7 A. No.

8 Q. Then you continue on, and I think this is your summary
9 again of Mr. Jones speaking, where it says something to the
10 effect of, "It is fucking bullshit. I tried to call him and
11 won't come. I don't give a shit." Do you see that?

12 A. Yes.

13 Q. Is that Mr. Jones speaking?

14 A. Yes.

15 Q. When you were writing swear words, were those the words
16 that the -- were actually being communicated during the
17 call?

18 A. Yes.

19 Q. You weren't summarizing them or using different
20 language?

21 A. No.

22 Q. Does that raise a concern for you?

23 A. Yes.

24 Q. Why?

25 A. Because it's disrespectful.

1 Q. Does it raise any concerns for you that Mr. Jones could
2 be holding a grudge against Mr. Kramer for this
3 investigation?

4 A. I wouldn't be able to make that assumption.

5 Q. Did you investigate that at all, about whether Mr. Jones
6 was upset with Mr. Kramer?

7 A. No.

8 Q. And that he was potentially treating Mr. Kramer worse
9 because of this investigation? Did you ever investigate
10 that?

11 A. No.

12 Q. Does this raise any concern for you, your notes or your
13 recollection of that conversation, that Mr. Jones could have
14 been retaliating against Mr. Kramer potentially?

15 A. I wouldn't be able to say.

16 Q. In your experience as an HR person, have you ever dealt
17 with a complaint about retaliation?

18 A. Yes.

19 Q. In those types of investigations, is it typical that the
20 person who's being accused of retaliation actually says,
21 "I'm retaliating against you right now." Do people
22 typically say that?

23 A. No.

24 Q. Or do you have to interpret, as someone who's doing on
25 investigation, whether the context of when things are said,

1 how things are said, if that could be interpreted as
2 retaliation? Is that something you do as an HR
3 investigator?

4 A. Yes.

5 Q. That's an opinion you have to form in a professional
6 capacity because people often don't say, "I'm actually
7 retaliating against you." Right?

8 A. Correct.

9 Q. Sure. When you're doing an HR investigation -- and
10 let's just say the complaint is retaliation. What you have
11 to do in your capacity as an HR investigator is look at all
12 the circumstances, consider what people said, how they said
13 it, when they said it, the context in which things occurred,
14 and you make a determination based on all those facts and
15 circumstances whether you believe that retaliation is
16 happening.

17 A. Yes.

18 Q. There's a comment down the page a little bit from --
19 appears from Mr. Jones -- something to the effect of, "At
20 this point I am in survival mode." Do you see that?

21 A. Yes.

22 Q. Do you have any sense of what Mr. Jones was referring
23 to?

24 A. I don't know.

25 Q. Then there's some bullet points a little bit further

1 down with respect to this call. Is this a summary of a
2 discussion with Mr. Sanders after listening to the phone
3 call during this meeting?

4 A. Yes.

5 Q. The first bullet point appears to be, and you can tell
6 me if I'm wrong, appears to be some question to Mr. Sanders
7 from you about what bothered him about the call. Is that
8 right?

9 A. Correct.

10 Q. And then I'm assuming after the dash is what Mr. Sanders
11 said, or something to that effect?

12 A. Yes.

13 Q. And Mr. Sanders, or your summary says, "The cursing and
14 that he was threatening us with contractors." Do you see
15 that?

16 A. Yes.

17 Q. Do you have any idea what Mr. Sanders was referring to
18 when he said "threatening us with contractors?"

19 A. No.

20 Q. The second bullet point says something about writing up
21 a report on Monday, and within four days it was a 10. And
22 then it kind of goes on in the next couple sentences talking
23 about frogs and when something's going to break.

24 Do you have any recollection of what Mr. Sanders
25 was referring to there?

1 A. No.

2 Q. The third bullet point is I think Mr. Sanders saying, "I
3 told Mr. Jones before that I don't like it when he swears at
4 me and he continues to do it." Is that fair?

5 A. "And it still happens." Yes.

6 Q. Does that raise any concerns for you?

7 A. Yes.

8 Q. The next conversation or recording that it looks like
9 you listened to was a conversation again between Mr. Jones
10 and Mr. Sanders; is that right?

11 A. Yes.

12 Q. Do you have any indication of when that occurred?

13 A. I don't.

14 Q. Assuming it must have been before December 7th of 2015?

15 A. Yes.

16 Q. How did you determine the dates of the other recordings;
17 do you recall?

18 A. I don't recall.

19 Q. Anything about this what would be the fourth
20 conversation now, or fourth recording, that you summarized
21 that you thought was inappropriate?

22 A. My notes aren't as detailed on this one to be able to
23 get a full context, so I'm not sure if this is -- I would
24 imagine this is all the notes of the call. But from what
25 I'm seeing, I'm not taking exception with much. Just the

1 interaction between a supervisor and an employee.

2 Q. There appears to be a comment it looks like, at least
3 from your notes, that it's made by Mr. Jones, something to
4 the effect of, "I put myself out on a limb and don't follow
5 all the rules." Do you see that?

6 A. Yes.

7 Q. Is that, at least according to your notes, a comment by
8 Mr. Jones?

9 A. Yes.

10 Q. Does that raise any concerns with you?

11 A. Without knowing what speaking of the rules, I wouldn't
12 be able to say.

13 Q. A little bit further down there's a comment about, "We
14 aren't the only ones that cut the corners." Do you see
15 that?

16 A. Yes.

17 Q. Is that Mr. Jones again, according to your notes?

18 A. Yes.

19 Q. And then there's a little bit further down it says, "I
20 wouldn't say that we are going to follow the EI book." Do
21 you see that?

22 A. Yes.

23 Q. Do you know what the EI book is?

24 A. I believe it's Engineering Instructions, but I can't say
25 for certain.

1 Q. Does that raise any concerns for you?

2 A. I would need more context to see what was being referred
3 to before I could make my assessment.

4 Q. The last recording, or your summary of the last
5 recording, is on the bottom of this page and then continues
6 on to the next page. Is it there anything from your notes
7 or your independent recollection that you find inappropriate
8 about this call?

9 A. And then your question was if I took exception with
10 anything?

11 Q. Correct.

12 A. Yes.

13 Q. And what is that?

14 A. The context of the conversation concerns regarding if
15 we're protecting it or not, and then the interactions in
16 which Blaine is disclosing to Don her interactions with her
17 supervisor. And then -- and then if there were comments
18 that we're actually making someone feel incompetent, that
19 would raise a flag about THE work environment would be the
20 main thing that I took exception to.

21 Q. Are any of those comment by Mr. Sanders that you just
22 referenced, you referenced the context. You referenced if
23 you're protecting the track or not. The interaction or
24 disclosing the interaction with a supervisor, and making
25 comments that could potentially being interpreted as being

1 incompetent. Are you saying that Mr. Sanders did any of
2 those things?

3 A. Yes, he did.

4 Q. And what are you saying?

5 A. He had made the comment that -- Mr. Sanders made the
6 comment of, "I'm constantly being asked and it makes me feel
7 incompetent."

8 Q. Are you saying that that's an inappropriate comment by
9 Mr. Sanders or it raises a concern for you that somebody
10 else might be treating Mr. Sanders wrong?

11 A. It would raise a concern with me regarding how
12 Mr. Sanders would be treated.

13 Q. Okay. Is there anything from you can tell in your notes
14 or what you independently recollect that Mr. Sanders did
15 inappropriate during this phone call?

16 A. Not that I'm seeing, no.

17 Q. I think you said before that you understand that Mr. --
18 Ms. Hoppenrath was Mr. Sanders' direct supervisor.

19 A. Correct.

20 Q. Do you have any knowledge of that interaction between
21 Ms. Hoppenrath and this individual named Brian?

22 A. No.

23 Q. Kind of in the middle of -- we're now on page ending in
24 7087 -- there's the larger paragraph at the top of the page,
25 kind of, I don't know, a third of the way down from the top

1 in the middle. It says -- appears Ms. Hoppenrath says
2 something to the effect of, "I have Keith yelling at me."
3 Do you see that?

4 A. Yes.

5 Q. Do you have any knowledge of why Keith -- or let me back
6 up. Did you understand it to be Keith Jones?

7 A. Yes.

8 Q. Is Mr. Jones Ms. Hoppenrath's direct supervisor?

9 A. Yes.

10 Q. Do you have any knowledge of why Mr. Jones was yelling
11 at Ms. Hoppenrath?

12 A. No.

13 Q. Does that raise any concerns for you?

14 A. It would raise a concern if it was accurate regarding
15 the treatment of employees, yes.

16 Q. Are you aware of any investigation into Mr. Jones's
17 treatment of Ms. Hoppenrath?

18 A. I can't recall.

19 Q. Did Mr. Sanders complain to you during this conversation
20 that he felt like he was being harassed?

21 A. The context of his conversation was mistreatment by
22 supervisors, and then he states that he feels he is being
23 harassed, yes.

24 Q. Okay. Did he explain why he felt he was being harassed?

25 A. I would be making an assumption, but it would be the

1 conversations.

2 Q. Did you ever make some type of conclusion about why --
3 let me ask you this: Did you make any conclusion about
4 whether Mr. Sanders was being harassed or mistreated?

5 A. I think there's a difference between harassed and
6 mistreated.

7 Q. What's your definition of -- or what's your definition?

8 A. Well, treatment of an employee is how they're being
9 treated. Harassed is that they're just picking on him for
10 one reason.

11 Q. And what conclusion did you come to?

12 A. That Mr. Sanders wasn't being treated respectfully in
13 all situations.

14 Q. Anything else?

15 A. Not that I can recall.

16 Q. Did Mr. Sanders ever explain to you or detail to you
17 that he felt like he was being harassed because he was
18 reporting defects or entering slow orders?

19 A. I can't recall.

20 Q. What about him complaining that he was being retaliated
21 against for doing those things?

22 A. I can't recall.

23 Q. Does this -- listening to these recordings that you did
24 in your summary, does that raise any concerns for you that
25 Mr. Sanders might have been being retaliated against by

1 Mr. Jones or Ms. Hoppenrath for reporting defects or
2 entering slow orders?

3 A. No.

4 Q. Not at all?

5 A. Not without additional information.

6 Q. Did you get additional information to make that
7 determination after you listened to these phone calls?

8 A. I believe that there -- I reviewed another document with
9 my notes. Could I be able to reference that?

10 Q. Not sure what you're referring to.

11 A. Because you had asked about my -- if I sent this to
12 anyone, and I did reference an email where I had sent it
13 to -- and my additional notes would be on there.

14 Q. You've been handed what's been marked as Exhibit 43
15 which appears to be an email from you dated December 7th,
16 2015 at 5:09 p.m. to Mr. Morgan and Mr. Spire. Do you see
17 that?

18 A. Yes.

19 Q. And the subject is, "Internal Complaint Don Sanders
20 discussion - December 7th." Right?

21 A. Yes.

22 Q. Then there appears to be an attachment which is just
23 labeled Don Sanders.doc. Do you see that?

24 A. Yes.

25 Q. Is -- do you know what that attachment was?

1 A. It would have been this Exhibit 42.

2 Q. Your typed up notes from the recordings and your
3 conversation with Mr. Sanders that day?

4 A. Yes, sir.

5 Q. And is this -- you made reference earlier to some
6 additional notes that you had.

7 A. Uh-huh.

8 Q. Are these in Exhibit 43 those additional notes that you
9 would have sent to your superiors within HR?

10 A. Yes, sir.

11 Q. Do you recall any additional emails, summaries, things
12 like this that you would have sent to your superiors
13 regarding any interaction with Mr. Sanders about this
14 complaint?

15 A. I can't say for certain.

16 Q. You kind of detail -- initially you have a "contact
17 section" about how the meeting with Mr. Sanders came about
18 on December 7th. Is that fair?

19 A. Yes.

20 Q. Then there's a "summary section" which kind of
21 summarizes your notes and the phone calls in Exhibit 42. Is
22 that fair?

23 A. Yes.

24 Q. And you indicate that Mr. Sanders was complaining that
25 he was unhappy with how he was being treated by management;

1 right?

2 A. Yes.

3 Q. You also reference that in the next sentence there that
4 Mr. Sanders indicated he had notes dated back to August 9,
5 2013. Do you see that?

6 A. Yes.

7 Q. Do you recall seeing notes from Mr. Sanders?

8 A. No. I had asked for them and he did not have them.

9 Q. Okay. Do you know if he ever provided them to you?

10 A. Not that I recall.

11 Q. Do you know if you ever followed up with him to get the
12 notes?

13 A. I can't say for certain.

14 Q. Your summary then kind of goes on and indicates that
15 Mr. Sanders pulled out a recording device. Does that
16 refresh your recollection about how you listened to the
17 phone calls?

18 A. Yes.

19 Q. Do you have any concerns about Mr. Sanders recording
20 conversations with his superiors?

21 A. Yes.

22 Q. How so?

23 A. Because part of his concern was the treatment, and I had
24 explained that a relationship is based on trust and
25 communication; and if he's recording conversations, that's

1 not always trusting his leaders.

2 Q. Is that a violation of any BNSF policy to record
3 conversations with your superiors?

4 A. Not that I recall.

5 Q. Did you ever investigate Mr. Sanders for recording
6 conversations with his superiors?

7 A. Did I investigate?

8 Q. Correct.

9 A. No.

10 Q. Did you ever review BNSF policy to determine whether
11 that was in fact a violation of policy or not?

12 A. I can't say for certain.

13 Q. Do you know if anybody else did?

14 A. I can't speak to that.

15 Q. Do you know if Mr. Sanders was ever disciplined for
16 recording conversations with his superiors?

17 A. No, he wasn't disciplined.

18 Q. You indicate in the next paragraph under the summary
19 section, it starts with a conversation on November 23rd. Do
20 you see that?

21 A. Yes.

22 Q. And you describe that Mr. Jones was raising his voice
23 and was also cursing regularly in that conversation. Is
24 that a fair description of that conversation, as far as you
25 can recall?

1 A. Yes.

2 Q. You also say, your next sentence says, "Although
3 Mr. Sanders shouldn't have called the FRA and should have
4 talked with Keith and Blaine first regarding his concerns,
5 Keith did not communicate his concerns aligned with the BNSF
6 leadership model." Do you see that?

7 A. Yes.

8 Q. Why do you write, "Although Mr. Sanders shouldn't have
9 called the FRA"?

10 A. That was a conversation that would have -- should have
11 happened internally first to have his questions answered
12 before calling the FRA.

13 Q. Is there any policy or instruction that tells
14 Mr. Sanders that anywhere that you've seen?

15 A. I don't know.

16 Q. Your third paragraph under the summary section is
17 referencing the December 3rd call between Mr. Jones and
18 Mr. Sanders, and you make reference to, "Mr. Jones comments
19 that he's embarrassed when he gets something from Ft. Worth
20 on a division that he's not aware of." Do you see that?

21 A. Yes.

22 Q. And Mr. Sanders says, "Well, I report all the issues
23 with the frogs and TIMS," according to your notes; right?

24 A. Yes.

25 Q. Do you have any knowledge of whether Mr. Sanders is

1 supposed to do more than that, more than reporting it in
2 TIMS?

3 A. That would be outside of my scope.

4 Q. Do you know what TIMS is, T-I-M-S.

5 A. I would be guessing if I said for certain. It's an
6 engineering system, I know that.

7 Q. Then you make reference to the fact that there was a
8 conversation, or during this conversation Mr. Jones was
9 talking about Kramer and included some very inappropriate
10 communication; right?

11 A. Yes.

12 Q. Then the next section you reference some information
13 that you shared with Mr. Sanders; right?

14 A. Yes.

15 Q. Do you recall any discussion with Mr. Morgan or
16 Mr. Spire before you sent this email?

17 A. I don't know who exactly I talked to, but my notes at
18 the beginning of the email state, "per the discussion," so I
19 would imagine I talked to one or both of them but I can't
20 say for certain.

21 Q. Is it typical that when you've done, you know, a similar
22 type of investigation like this, that you'll provide a
23 recommendation to your superiors?

24 A. Yes.

25 Q. And then do your superiors make the ultimate

1 determination about whether any discipline will be imposed?

2 A. It's a collaborative effort.

3 Q. Do you recall having any discussions with Mr. Morgan or
4 Mr. Spire after this email about whether discipline should
5 be imposed and at what level?

6 A. A -- I don't know if a conversation had happened or if
7 it was this email, but I know that we did follow -- there
8 was follow-up from HR with Mr. Jones on his behavior.

9 Q. Is it fair to say that the last thing at least you
10 recall from what you've seen thus far is sending this email?

11 A. So there must have been a conversation because I know
12 Mr. Jones received discipline. So I don't know who I talked
13 about that, whether it was Mr. Morgan or Mr. Spire.

14 Q. Okay. In your recommendation you also say, "I also
15 think a letter of anti-retaliation is important because
16 Mr. Sanders feels already that he is treated different." Do
17 you see that?

18 A. Yes.

19 Q. Who would this anti-retaliation provision go to?

20 A. Who would it go to?

21 Q. Correct.

22 A. What do you mean?

23 Q. Who are you recommending receive a letter of
24 anti-retaliation?

25 A. Mr. Jones.

1 Q. Why would you provide that to Mr. Jones?

2 A. The anti-retaliation letter is a preventive measure to
3 ensure that employees feel comfortable bringing forward
4 concerns to HR. So when a concern is brought forward, that
5 is common to be able to share that with a supervisor, the
6 anti-retaliation.

7 Q. Do you know what Mr. Sanders -- do you know that
8 Mr. Sanders was eventually terminated from BNSF?

9 A. Yes.

10 Q. Were involved in making that determination in any
11 respect?

12 A. No.

13 Q. Did you ever review any of the investigation
14 transcripts?

15 A. No.

16 Q. Were you ever involved in any of the discussions about
17 what discipline would be imposed as a result against
18 Mr. Sanders?

19 A. Not that I recall, no.

20 Q. Do you know who was involved in any respect about
21 recommending or making the decision about Mr. Sanders'
22 termination?

23 A. I wouldn't be able to say for certain who was involved.

24 Q. Do you know who charged with Mr. Sanders with a
25 violation initially?

1 A. No.

2 Q. From you raise concerns from you from an HR perspective
3 if the individual, or one of the individuals, who charged
4 Mr. Sanders with a violation was Mr. Jones just a couple
5 months after this complaint?

6 A. The context would be an important piece of that.

7 Q. Could it raise an issue for you?

8 A. Not without context of the situation.

9 Q. When you say "context," what do you mean?

10 A. Without knowing details of why a dismissal happened, I
11 wouldn't be able to say if it would raise concerns or not.
12 That would have been vetted with other parties, not me.

13 Q. Do you know what discipline Mr. Jones ultimately
14 received as a result of Mr. Sanders' complaint in
15 December of 2015?

16 A. He received a coaching and counseling letter of some
17 kind.

18 Q. Why did up make that recommendation that Mr. Jones
19 receive a coaching and counseling letter as opposed to some
20 other level?

21 A. Because that was, from my knowledge, the first time he
22 had had an issue; therefore, that first step in discipline
23 would be providing a coaching and counseling letter and
24 resetting expectations for a leader.

25 Q. Are there some violations that warrant discipline -- I

1 mean warrant suspension regardless of whether the person's
2 been disciplined before?

3 A. That would be outside of my scope.

4 Q. Why do you say that?

5 A. In my role I wouldn't have been in the position to be
6 able to suspend a part of management.

7 Q. What levels of discipline can you, as someone in HR,
8 recommend?

9 A. It would depend on the situation in terms what I could
10 recommend. Most instances would be coaching and counseling
11 or -- mostly coaching and counseling.

12 Q. Can up recommend dismissal if you think it's
13 appropriate?

14 A. That wouldn't have been a recommendation that I would
15 make in that level of my role within HR.

16 Q. That's kind of what I'm trying to figure out. And I'm
17 not saying just in this incident. I'm saying when you're
18 doing an HR investigation, okay, during your time with BNSF,
19 was there a limit on what level of discipline you could
20 recommend? Saying like this is the highest thing you can
21 recommend is a coaching counseling? Or can you recommended
22 termination or suspension if you think it's appropriate?

23 A. I would be able to make more recommendations.

24 Q. So fair to say that you can recommend sort of any level
25 of discipline that you think is appropriate with the

1 understanding that they might disagree, your supervisors?

2 A. Yes.

3 Q. Why did you settle on the coaching and counseling level
4 of recommendation for Mr. Jones?

5 A. Based on the comments that I had previously made about
6 the context of the conversation and the tone, and to my
7 understanding he didn't have previous discipline, so
8 coaching and counseling was appropriate.

9 Q. Exhibit 26 appears to be a letter from you to
10 Mr. Sanders dated December 16th of 2015 notifying him of the
11 completion of the investigation and findings regarding his
12 complaint on December 7th. Is that fair?

13 A. This would have been a draft since there's not a
14 certified letter number on it.

15 Q. And who would this draft go to?

16 A. It would go to Mr. Morgan.

17 Q. For his approval?

18 A. Yes.

19 Q. Do you know if he had any edits that he suggested?

20 A. I would imagine so; but without comparing the two, I
21 couldn't say for certain what he would make a change to.

22 Q. Do you know if this is the language that was eventually
23 sent to Mr. Sanders?

24 A. No, it -- this wouldn't be the final that was sent to
25 Mr. Sanders.

1 Q. Do you know if there were any changes to the actual
2 wording before it was sent to Mr. Sanders?

3 A. I wouldn't say -- be able to say without looking at the
4 other one.

5 THE COURT: Ms. Donesky, sorry to interrupt. We
6 need to take a break here within the next three or four
7 minutes, so if there's a good point --

8 MS. DONESKY: It would be a good point now, I
9 believe.

10 THE COURT: If now would be a good point, Members
11 of the Jury, we'll adjourn for about an hour break here. I
12 realize that we haven't made the most efficient use of the
13 time this morning and I apologize for that.

14 I have other court business that I have to attend
15 to here over the lunch hour today, and so we're not going to
16 be able to make use of the next hour or so. Let's plan to
17 reconvene at 1 o'clock and resume at that time, all right?

18 All right. We're adjourned.

19 (Lunch recess taken at 11:57 a.m.)

20 * * * *

21 (1:00 p.m.)

22 IN OPEN COURT

23 (Without the Jury)

24 THE COURT: Let's excuse Mr. Boisso -- Dr. Boisso,
25 sorry. Dr. Boisso. Let's excuse Dr. Boisso. We will deal

1 with the front pay issue separate from testimony.

2 MR. JAMES KASTER: Very good. Thank you.

3 THE COURT: And then if I could add just one sort
4 of small caution, that the deposition transcript reading
5 slow down just a bit. That would help Mr. Willette here
6 create an accurate record.

7 MS. DONESKY: Will do.

8 THE COURT: All right. We can bring the jury in.
9 Thank you.

10 MR. JAMES KASTER: Your Honor, we've agreed the
11 full report will go in for your review.

12 THE COURT: Great. Thank you.

13 MR. JAMES KASTER: Thank you.

14 (Jury enters)

15 THE COURT: Thank you, everyone. Please be
16 seated.

17 Ms. Donesky?

18 MS. DONESKY: Thank you.

19 BY MS. DONESKY:

20 Q. And who would this draft go to?

21 A. It would go to Mr. Morgan.

22 Q. For his approval?

23 A. Yes.

24 Q. Do you know if he had any edits that he suggested?

25 A. I would imagine so, but without comparing the two, I

1 couldn't say for certain what he would make a change to.

2 Q. Do you know if this is the language that was eventually
3 sent to Mr. Sanders?

4 A. No, it -- this wouldn't be the final that was sent to
5 Mr. Sanders.

6 Q. Do you know if there were any changes to the actual
7 wording before it was sent to Mr. Sanders?

8 A. I wouldn't say -- be able to say without looking at the
9 other one.

10 Q. Before this letter on December 16th of 2015, so from
11 December 7th when you have this conversation with
12 Mr. Sanders and then you send this follow-up email to your
13 superiors, to December 16th of 2015, do you recall if you
14 did anything else as part of an investigation into
15 Mr. Sanders' complaint?

16 A. I can't recall.

17 Q. Are you aware of whether any of your superiors did
18 anything else with respect to investigating Mr. Sanders'
19 complaint during that period of time, December 7th to
20 December 16th?

21 A. I can't recall or I don't know.

22 Q. Do you know if any other employees at BNSF were ever
23 interviewed to determine whether Mr. Jones had engaged in
24 similar interactions with them?

25 A. I don't know. The recordings spoke for themselves in

1 terms of me feeling that I had enough to be able to say that
2 Mr. Jones was out of line.

3 Q. Your second paragraph there, the first sentence reads:
4 "The investigation does not substantiate your allegation
5 that the Division Engineer Keith Jones, and Roadmaster
6 Blaine Hoppenrath, are continually mistreating and singling
7 Mr. Sanders out." Do you see that?

8 A. Yes.

9 Q. Why do you write that the allegation was not
10 substantiated if Mr. Jones was disciplined?

11 A. The piece about singling out.

12 Q. What did you rely upon to make that determination that
13 Mr. Sanders was not being singled out?

14 A. I can't say for certain.

15 Q. You go on to say that: "There was evidence that
16 Mr. Jones used discourteous language on November 23rd, 2015
17 and December 3rd, 2015." Do you see that?

18 A. Yes.

19 Q. I'm just wondering if your investigation -- if you
20 concluded that Mr. Sanders' allegation was not
21 substantiated, why was Mr. Jones disciplined in any respect?

22 A. Because of the language that was being able to use and
23 being able to have appropriate respect for employees in the
24 workplace.

25 Q. Doesn't that assume that Mr. Sanders' allegations were

1 at least substantiated in part?

2 A. Well, it says that there was -- in this draft there was
3 evidence that he used discourteous language. Discourteous
4 language doesn't necessarily mean being singled out.

5 Q. Could mean mistreatment, though; right?

6 A. Could be.

7 Q. Does this tell Mr. Sanders that Mr. Jones is being
8 disciplined?

9 A. It has, "BNSF has taken timely, appropriate, corrective
10 action to resolve the issue."

11 Q. Mr. Sanders wasn't told that Mr. Jones received a
12 coaching and counseling?

13 A. No, I would never tell an employee how another employee
14 was disciplined.

15 Q. Did you ever have a follow-up conversation with
16 Mr. Sanders about him receiving this letter or a similar
17 version of this letter?

18 A. I can't recall.

19 Q. Let's go to Exhibit 27.

20 A. Okay.

21 Q. This is a coaching and counseling letter that was sent
22 to Mr. Jones dated December 22nd of 2015. Do you see that?

23 A. Yes, sir.

24 Q. Did you play any part in drafting this letter?

25 A. I would have played a role given the specifics of this,

1 yes.

2 Q. The letter was from Doug Jensen. Do you see that?

3 A. Yes.

4 Q. Okay. And then it says: "Specifically, your use of
5 profanity while speaking with MOW Track Inspector Don
6 Sanders on November 23rd, 2015 regarding his recent contact
7 with the FRA to ask questions and discuss track conditions."
8 Do you see that?

9 A. Yes.

10 Q. Would you agree with me that that paragraph is
11 indicating to Mr. Jones that what he did wrong was this one
12 conversation on November 23rd, 2015?

13 A. That's giving a specific example, yes.

14 Q. No other examples were given; right?

15 A. Correct.

16 Q. I mean, you've -- would you agree with me that you found
17 inappropriate conduct in Mr. Jones's conversations with
18 Mr. Sanders outside of November 23rd, 2015?

19 A. Yes.

20 Q. Did you ever have a conversation with your superiors and
21 say, Hey, I think we need to tell Mr. Jones the full extent
22 of what we found to be inappropriate?

23 A. I can't recall.

24 Q. Were you involved at all in communicating this coaching
25 and counseling to Mr. Jones?

1 A. No.

2 Q. If we can turn to Exhibit 28. This is a letter dated
3 December 23rd, 2015, again to Mr. Sanders.

4 A. Uh-huh.

5 Q. And can you tell me what this is?

6 A. This would have been the formal letter that was sent to
7 Mr. Sanders.

8 Q. Okay.

9 A. Regarding his complaint closeout.

10 Q. So is this the final version that was sent to him?

11 A. Yes.

12 Q. Okay. I didn't the difference between the two earlier.
13 Okay. So that what we looked at before, Exhibit 1 -- well I
14 think 26 was your original draft?

15 A. Yes, sir.

16 Q. And then Exhibit 28 is what you understand to be the
17 final letter that was sent to Mr. Sanders?

18 A. Yes, sir.

19 Q. All right. Do you know who made the edits?

20 A. It would have been Terry Morgan. I don't know as
21 though -- I can't say for certainty if someone else was
22 involved.

23 Q. You indicated earlier on in your testimony that you were
24 involved in a second investigation regarding Mr. Sanders.

25 A. Correct.

1 Q. When is the next time you hear of Mr. Sanders?

2 A. I -- Mr. Spire had approached me regarding his
3 conversation. I would be speaking secondhand, so Mr. Spire
4 had approached me about providing some training to the MOW
5 group and said it would include Mr. Sanders.

6 Q. Why was Mr. Sanders' name brought up, do you know?

7 A. Because of my previous interaction, just letting me know
8 the work group that I would be talking to.

9 Q. And what was the training you were supposed to do?

10 A. It was going to be a combination training that would
11 include our standard presentation that we provide regarding
12 EEO, anti-harassment, and discrimination training.

13 Q. And did you provide that training?

14 A. Yes.

15 Q. Do you recall when?

16 A. It was in the spring of the following year, but I can't
17 say for certain the date.

18 Q. And we looked at December 7th, 2015, which was your
19 discussion with Mr. Sanders. Then December 15th of 2015
20 indicates that there was an anti-retaliation process
21 activated concerning Mr. Sanders' complaint and concern
22 about retaliation. Do you see that?

23 A. Yeah.

24 Q. Do you know what that process was that was activated?

25 A. It would have been the anti-retaliation letter.

1 Q. To Mr. Jones?

2 A. To Mr. Jones.

3 Q. Okay. Do you know who drafted that?

4 A. It's a standard BNSF letter, and you make slight changes
5 based on what you have; but including the name, the
6 supervisor's name; but it's pretty standard.

7 Q. Does BNSF have an anti-retaliation policy?

8 A. Yes.

9 Q. From your experience, do they take it seriously?

10 A. Absolutely.

11 Q. Then we see December 22nd, the coaching and counseling
12 letter to Mr. Jones. December 23rd is your letter to
13 Mr. Sanders and the completion of the investigation; right?

14 A. Yes.

15 Q. Then there's this date of January 6 where Joe Spire
16 talks with Ms. Hoppenrath about Mr. Sanders' complaint about
17 use of a vehicle. Do you see that?

18 A. I see the notes but I don't see that Mr. Sanders is
19 making a complaint about it, use of company vehicle?

20 Q. So then if we go down to the 8th and we go under what
21 kind of first description under the 8th we see, "Roadmaster
22 Hoppenrath contacted. HR team to attend the safety meeting
23 on February 24th, 2016." Do you see that?

24 A. Yes.

25 Q. Okay. Did Ms. Hoppenrath contact you?

1 A. Not that I recall. It would have been Joe Spire, I
2 believe.

3 Q. And then we see February 24th, 2016, there's a
4 description of Magenta, being you, and Mr. Spire lead an EEO
5 and Read presentation to cover -- and cover the BNSF vehicle
6 policy. Do you see that?

7 A. Yeah.

8 Q. All right. Is this the training that you were referring
9 to earlier that you did when you were notified that
10 Mr. Sanders would be there?

11 A. Yes.

12 Q. If we -- why don't we turn to Exhibit 31 in your book.
13 Did you have a file on Mr. Sanders that looked like this?

14 A. I had pieces of it, but Mr. Freshour had requested any
15 documents that I had had regarding Mr. Sanders. Therefore,
16 I sent him everything that I had, which a lot of this is
17 included in.

18 Q. Okay. And the first part of Exhibit 31 is two pages of
19 notes that are typewritten. Are these your notes?

20 A. Yes.

21 Q. I see your signature on the bottom of the second page?

22 A. Yeah.

23 Q. All right. Are these your notes regarding conversations
24 in early January, and then the training that eventually
25 occurred in February of 2016?

1 A. Yes.

2 Q. It indicates that in the beginning of January that there
3 was some conversations between Mr. Sanders and
4 Ms. Hoppenrath about using a vehicle. Is that fair?

5 A. Well, I don't know as though the conversations were
6 between Mr. Sanders and Ms. Hoppenrath. I know that their
7 conversation was with Ms. Hoppenrath and Mr. Spire regarding
8 this situation.

9 Q. We'll come back to your notes. If you can flip in the
10 same exhibit to the Bates label that's ended 7201.

11 A. The letter or the email?

12 Q. Correct.

13 A. Okay.

14 Q. So this is a couple emails. The first one in the bottom
15 of the page appears to be from Ms. Hoppenrath dated January
16 6th of 2016 regarding an interaction she had with
17 Mr. Sanders. Do you see that?

18 A. Yes.

19 Q. And it looks like on the top of the page that Mr. Spire
20 then forwarded it to both Mr. Morgan and yourself --

21 A. Yes.

22 Q. -- later that day. Do you see that?

23 A. Yes.

24 Q. Do you recall receiving this email at all?

25 A. Yes.

1 Q. Okay. And Ms. Hoppenrath is detailing a conversation
2 she had with Mr. Sanders, at least in part, that dealt with
3 his ability to take a vehicle home. That, at least in part,
4 that Ms. Hoppenrath is detailing that she had a conversation
5 with Mr. Sanders about being -- his ability to take a
6 vehicle home?

7 A. Part of the conversation was regarding a vehicle use,
8 yes.

9 Q. Did you have any discussions with Mr. Spire or
10 Mr. Morgan after receiving this email from Ms. Hoppenrath?

11 A. A discussion would have happened, yes.

12 Q. And do you recall anything that was discussed about how
13 to respond?

14 A. No. The only thing is that we would add vehicle --
15 discussion of vehicle to the training that we were providing
16 to the group.

17 Q. So that was why that was added?

18 A. Correct.

19 Q. Okay. Explain to me what happens during the training in
20 February of 2016?

21 A. In what context?

22 Q. Did Mr. Sanders do anything that you felt was
23 inappropriate?

24 A. So as we were going through the presentation, which my
25 notes indicate he was asking -- there were a lot of

1 questions from the group as a whole, and Mr. Sanders had
2 asked multiple questions about the same issue that was very
3 personal to him. So I had had to ask if we could have a
4 sidebar conversation following instead of in front of
5 everyone.

6 Q. You indicated that a number of people had questions
7 regarding the training that you provided; is that right?

8 A. My notes indicate that only two people had questions.
9 Mr. Sanders and someone else.

10 Q. So there's -- on 7190 there appears to be a PowerPoint
11 presentation titled "Preventing Harassment and
12 Discrimination." Do you see that?

13 A. Yes, sir.

14 Q. Is this the presentation that was provided during this
15 training in February of 2016?

16 A. Yes.

17 Q. And that's a series of, looks like, three pages of
18 slides with six slides on each page. And then if we go to
19 7193, it appears that this could be a separate PowerPoint
20 presentation called "Respect Every Day" or "Read"?

21 A. Yes.

22 Q. And were both of these presentations given during the
23 training in February?

24 A. Both were given during the training but not by me,
25 not -- both of them weren't by me.

1 Q. Okay. Did you give one of them and then Mr. Spire gave
2 a different one, do you recall?

3 A. The -- I gave the first one. The "Read" presentation
4 was given by Connie Swanson.

5 Q. If we go back to your notes now in the front of Exhibit
6 31, the bottom of that first page seems to indicate that
7 after the presentations were made that Mr. Sanders came up
8 to you and asked to speak; is that right?

9 A. Correct.

10 Q. And then you have a conversation with Mr. Sanders sort
11 of outside the presence of everybody else.

12 A. Correct.

13 Q. And he again brings up this vehicle policy issue.

14 A. Correct.

15 Q. And I see in the second bullet point there that
16 Mr. Sanders asked to look into the vehicle policy because he
17 feels that he's being discriminated and harassed against
18 because he isn't allowed to take a company vehicle home. Do
19 you see that?

20 A. Yes.

21 Q. Did you consider that to be an official complaint of
22 discrimination and harassment?

23 A. Yes.

24 Q. Can BNSF employees file such a complaint orally or in
25 writing?

1 A. Yes. It's preferred they do it in writing, but we'll
2 take it in verbal.

3 Q. He then, Mr. Sanders then, at least according to your
4 notes, indicated in some respect that your investigation in
5 November/December was incorrect or wrong. Do you see that?

6 A. Correct.

7 Q. The next bullet point indicates that you went back to
8 your office and then Ms. Hoppenrath comes in?

9 A. Uh-huh.

10 Q. Is that yes?

11 A. Yes.

12 Q. And you explain to her at some -- at that point that you
13 had a complaint.

14 A. Correct.

15 Q. Did you say what the complaint was, do you recall?

16 A. I don't recall.

17 Q. Did you explain who made the complaint?

18 A. No.

19 Q. There is at least some discussion about -- appears to be
20 from your notes -- about a vehicle issue?

21 A. Uh-huh.

22 Q. Did you explain to Ms. Hoppenrath that it pertained to
23 use of vehicles?

24 A. Yes.

25 Q. Did you explain that there must have been some

1 discussion about it being a track inspector?

2 A. Yes.

3 Q. Who was complaining about the vehicle?

4 A. Yes.

5 Q. And then Ms. Hoppenrath gave you her practice regarding
6 that. Is that fair?

7 A. Correct.

8 Q. Then it says you reviewed policy regarding vehicle
9 usage; is that right?

10 A. Correct.

11 Q. And then March 22nd, the second to last bullet point,
12 you have kind of a follow-up conversation with
13 Ms. Hoppenrath; is that right?

14 A. Correct.

15 Q. And then it looks like you drafted the closeout letter
16 to Mr. Sanders.

17 A. Correct.

18 Q. Your signature on the bottom is dated April 8th of 2016.
19 Do you see that?

20 A. Correct.

21 Q. So is it fair to assume that these notes go through at
22 least that day?

23 A. Yes.

24 Q. And if you had done additional investigation talking to
25 people, looking at other documents, would you have noted it

1 in here?

2 A. I do not recall.

3 Q. Did it raise any concerns to you that this vehicle issue
4 appeared to arise shortly after Mr. Sanders filed his
5 complaint against Mr. Jones and Ms. Hoppenrath in
6 December of 2015?

7 A. No.

8 Q. Never crossed your mind?

9 A. No.

10 Q. If we can turn to the next page --

11 A. Okay.

12 Q. -- which is 7184. Do you see that?

13 A. Yes.

14 Q. This is an email from you dated March 22nd of 2016 to
15 Doug Jensen, Keith Jones, Terry Morgan, and it includes a
16 closeout -- appears to be a closeout letter as an
17 attachment.

18 A. Yes.

19 Q. Do you see that? Okay.

20 The next page, 7185, appears to be that closeout
21 letter. Is that right?

22 A. Yes.

23 Q. To Mr. Sanders?

24 A. Yes.

25 Q. I'm asking about conversations, like in-person

1 conversations. So we saw that you gave the training at the
2 end of February?

3 A. Yeah.

4 Q. And that's when Mr. Sanders brought up this issue --

5 A. Uh-huh.

6 Q. -- about vehicle usage, and he thought he was being
7 discriminated, harassed about. And then we see the closeout
8 letter or email regarding your closeout letter on March
9 22nd, 2016, so I'm talking about between these two periods
10 of time from February 24th, 2016 to March 22nd, 2016. Did
11 you have any discussions with any of these people on this
12 email, Mr. Jensen, Mr. Jones, Mr. Morgan, about this issue?

13 A. I can't say with certain, no.

14 Q. Other what's detailed in your notes, I think you said
15 you don't recall doing anything else regarding this
16 investigation?

17 A. I don't recall, no.

18 Q. Then we go to the closeout letter, again dated March
19 22nd. Do you recall did you have any follow-up
20 conversations with Ms. Hoppenrath regarding this complaint
21 that aren't detailed in your notes?

22 A. I don't recall.

23 Q. Did you discuss with her who was making the complaint?

24 A. Not that I recall.

25 Q. And you indicated in your closeout letter again, you

1 made the determination that Mr. Sanders' allegations were
2 not substantiated. Is that fair?

3 A. Correct.

4 Q. Okay. How did you come or why did you come to that
5 conclusion?

6 A. I can't speak with certainty, but there would have
7 been -- something else would have happened in terms of
8 investigating the concerns, but I don't know what.

9 Q. Would you agree with me that simply because a policy
10 says a supervisor can make a decision doesn't necessarily
11 mean that they're not retaliating against somebody?

12 A. There would need to be more context to that.

13 Q. Sure. Let use this example. So with respect to the
14 vehicle issue, it seems as though under the policy
15 Ms. Hoppenrath has the discretion to allow track inspectors
16 to use vehicles and to drive them home, right? Is that your
17 understanding?

18 A. Correct.

19 Q. And my question is simply because the policy allows her
20 to make that decision, whether Mr. Sanders can drive a
21 vehicle home or not, that's not necessarily conclusive to
22 the issue of whether she's making that decision in
23 retaliation. Would you agree with that?

24 A. I wouldn't be able to speak to that.

25 Q. Because Ms. Hoppenrath could decide that she's going to

1 take away Mr. Sanders' ability to drive a vehicle under the
2 policy. Because she has the ability to do it, in
3 retaliation she could do that. I'm not saying that she did
4 that here. I'm just saying that that's possible she could
5 do that. Is that fair?

6 A. I don't know.

7 Q. And so Mr. Jones sent an email to HR that same day
8 saying, Hey, I've had these discussions with Mr. Sanders
9 where he says I'm asking him to do things outside the rules.
10 Did that surprise you at all that Mr. Jones just sort of
11 brought that up without knowing why Mr. Sanders went to HR?

12 A. No.

13 Q. I think you said before that you are not, or was not,
14 involved in Mr. Sanders' termination in any respect; right?

15 A. Correct.

16 Q. When did you leave Minnesota again?

17 A. July of 2016.

18 Q. Okay. Can we just turn to Exhibit 38 in that book for a
19 second? This is an online complaint made by Mr. Sanders in
20 April of 2016. Do you see that?

21 A. Yes.

22 Q. Have you seen this before?

23 A. No.

24 Q. Did you play any part in investigating this complaint by
25 Mr. Sanders?

1 A. No.

2 Q. Regarding the vehicle complaint and Mr. Sanders, was the
3 end of that investigation -- essentially was that concluded
4 with the closeout letter that was sent to Mr. Sanders?

5 A. Yes.

6 Q. You've been handed what's been marked has Exhibit 44.
7 Do you see that?

8 A. Yes, sir.

9 Q. If we look at the first email on the bottom of the page
10 from Mr. Freshour in April of 2016, he asks for you to
11 forward any complaints that you have regarding Mr. Sanders.
12 Do you see that?

13 A. Correct.

14 Q. Then you send Mr. Freshour an attachment later that day
15 with respect to Mr. Sanders.

16 A. Correct.

17 Q. Anybody else that you know of from Human Resources who
18 received Mr. Sanders' complaints about Ms. Hoppenrath and
19 Mr. Jones?

20 A. Mr. Freshour.

21 Q. With respect to the second complaint by Mr. Sanders
22 regarding the vehicle issue, we saw some notes and then your
23 closeout letter saying it was not substantiated. Was that a
24 decision that you made?

25 A. Yes.

1 Q. If we can go to number 9, we've talked generally about
2 BNSF anti-retaliation discrimination policies throughout
3 this deposition. Does BNSF have a handbook that applies to
4 their employees?

5 A. We have corporate policies that are available for all
6 employees that would touch on the anti-retaliation policy,
7 as well as EEO and anti-discrimination and harassment.

8 MS. DONESKY: Nothing further.

9 THE COURT: Thank you. You're excused.

10 And, Ms. Donesky, just to confirm and clarify,
11 BNSF has no other witnesses to call today?

12 MS. DONESKY: Yes, Your Honor.

13 THE COURT: Members of the Jury, we're going to
14 excuse you and adjourn for the day. We will reconvene
15 tomorrow morning at 10:00 a.m., and I expect that we will
16 have full days tomorrow and Monday; and then we will see
17 where we're at. I can give you -- or I should be able to
18 give you a better timetable or estimate of where we are at
19 at the end of the day tomorrow before we adjourn for the
20 weekend.

21 All right. We're adjourned.

22 (Jury excused)

23 THE COURT: We'll move our 8 o'clock start time in
24 the event there's something we need to deal with tomorrow
25 morning to 9:00. Does the plaintiff anticipate that there's

1 anything we'll need to deal with before we start tomorrow?

2 MR. JAMES KASTER: No, Your Honor.

3 THE COURT: How about BNSF?

4 MS. DONESKY: No, Your Honor.

5 THE COURT: We will be here and available just in
6 case.

7 All right. Thanks, everyone. We're adjourned.

8 (Proceedings concluded for the day at 1:45 p.m.)

9 * * * *

I N D E X

| | <u>PAGE</u> |
|-----------------------|--------------------|
| Colloquy with counsel | 553 |

W I T N E S S E S:**DALE E. BOISSO**

| | |
|--|-----|
| Direct Examination by Mr. James Kaster | 563 |
| Cross-Examination by Ms. Ferguson | 586 |
| Redirect Examination by Mr. James Kaster | 593 |

MAGENTA ROBERSON

| | |
|-------------------------------|-----|
| (Via Deposition Designations) | 602 |
|-------------------------------|-----|

* * * * *

E X H I B I T S

| <u>NUMBER</u> | <u>FOR ID IN EVIDENCE</u> |
|----------------------|----------------------------------|
| Plaintiff 288 | 568 |

C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter
for the United States District Court, do hereby
certify that the foregoing pages are a true and
accurate transcription of my shorthand notes,
taken in the aforementioned matter, to the best
of my skill and ability.

/s/ Timothy J. Willette

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - U.S. District Court
Warren E. Burger Federal Building & U.S. Courthouse
316 North Robert Street - Suite 146
St. Paul, Minnesota 55101
651.848.1224